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COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

Clerk's Stamp

APPLICANTS IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC AND DOMINION FINCO INC.

DOCUMENT **BENCH BRIEF OF DIAVIK DIAMOND MINES (2012) INC.**

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**BENCH BRIEF OF DIAVIK DIAMOND MINES (2012) INC.**

**IN RESPONSE TO THE APPLICATION SEEKING  
A SALE APPROVAL AND VESTING ORDER  
TO BE HEARD BY  
THE HONOURABLE MADAM JUSTICE K.M. EIDSVIK  
December 11, 2020 at 2:00 P.M.**

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## I. INTRODUCTION

1. Dominion Diamond and the other CCAA Applicants have filed an application (the “**Application**”) seeking, *inter alia*, the approval of the Asset Purchase Agreement, dated December 6, 2020 (the “**APA**”), between the CCAA Applicants, as vendors, and DDJ Capital Management, LLC and Brigade Capital Management, LP (collectively with any nominee of such parties, the “**Purchaser**”), as purchasers. Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the APA.

2. DDMI has serious and valid concerns with various elements of the APA and the proposed form of Approval and Vesting Order (the “**AVO**”). Having said this, DDMI’s intention in surfacing its concerns is solely related to ensuring its bargained for rights are not eradicated by the proposed transaction. DDMI’s concerns are easily addressed by amendments it proposes to the APA and AVO. DDMI has no desire to interfere with a going-concern transaction for the Ekati Mine.

3. Consistent with this position, following service of the Application it engaged with the Sellers, the First Lien Lenders and the Monitor in an effort to create clarity and finality in respect of both the Acquired Assets and the Encumbrances subject to vesting. The Monitor, the Sellers and the First Lien Lenders have all advised DDMI that the APA does not intend to convey any of Dominion Diamond’s interest in the Diavik Joint Venture to the Purchaser; rather, what is being conveyed by Dominion Diamond to the Purchaser are receivables that Dominion Diamond may receive from the Diavik Joint Venture.

4. DDMI seeks language in the transaction documents that is consistent with the representations made by the Sellers and First Lien Lenders. DDMI faces a circumstance where it is owed in excess of \$119 million in Cover Payment indebtedness and, given the failure of the SISF to bring forth an offer for the Diavik Mine, its only recoveries will be through Dominion Diamond’s share of diamond production. It will not take the risk that its future recoveries will be prejudiced by inexact drafting or competing interpretations of the APA and the AVO.

5. The draft form of AVO attached as Schedule “A” to the Application would vest certain Acquired Assets in the Purchaser, free and clear of all Encumbrances other than the Permitted Encumbrances, with the seemingly unintended effect of vesting DDMI’s valid and subsisting

security. The drafting is clumsy and does not square with the representations that have been made to DDMI.

6. Unless DDMI's proposed discrete amendments are accepted, both the APA and the AVO, in their current form, are fundamentally flawed:

- (a) while the Monitor, Sellers and First Lien Lenders have advised DDMI that the APA is not intended to effect a conveyance of Dominion Diamond's interest in the Diavik Joint Venture to the Purchaser, the materials submitted in support of the Application state the exact opposite. Mr. Bell testifies that the transaction provides for "...a going concern sale of substantially all of the Applicants' assets (but not including joint venture obligations related to the Diavik Mine)." This testimony clearly evinces an intention that what the Sellers are conveying is the Diavik Mine in a manner that is not permitted by the Diavik Joint Venture Agreement. The APA itself creates ambiguity, including by virtue of the fact that neither the Diavik Joint Venture Interest nor the Diavik Mine are identified as Excluded Assets and that the Diavik Realization Assets include broad, overreaching and vague references to rights relating to the Diavik Joint Venture Interest;

**Affidavit No. 6 of Thomas Croese, sworn on December 10, 2020, at para. 4(d) ["Croese Affidavit #6"].**

**Affidavit of Brendan Bell, sworn on December 7, 2020, at para. 5.**

- (b) DDMI's security interest under the Diavik Joint Venture Agreement (the "**DDMI Security**") ranks senior to the First Lien Lenders. However, the proposed APA and accompanying AVO preserves the security in favour of the First Lien Lenders on the Diavik Realization Assets and purports to extinguish DDMI's Cover Payment security.

7. Since DDMI understands that stakeholders see value in a broader going-concern transaction involving the Ekati Mine, it is prepared to be flexible and rather than opposing the approval of the APA and AVO, DDMI is thus proposing that a metaphorical scalpel be used to excise the broad-axe drafting contained in the AVO and APA (collectively, the "**Proposed Revisions**"). A blackline of the APA, containing DDMI's Proposed Revisions, is attached as

**Appendix “A”** to this Bench Brief. A blackline of the AVO, containing DDMI’s Proposed Revisions, is attached as **Appendix “B”** to this Bench Brief.

## **II. BACKGROUND**

8. The DDMI Security constitutes a valid and perfected security interest which is first-ranking as against DDMI’s collateral, including pursuant to the Intercreditor Agreements. The stay of proceedings in favour of Dominion Diamond has not extinguished that interest, which can only be extinguished by Dominion Diamond discharging the obligations secured thereby. The Proposed Revisions are therefore necessary to avoid a confiscation, however unintentional, of DDMI’s rights as a secured creditor.

**Eighth Report of the Monitor, dated October 29, 2020 at para. 26(a).**

**Copies of the Intercreditor Agreements are attached to the Supplemental Affidavit of Thomas Croese, sworn on May 7, 2020, as Exhibits “A” and “B” thereto.**

9. The Application materials were served at approximately 9 p.m. on Sunday, December 6, 2020. The CCAA Applicants provided their response to the issues and concerns raised by DDMI at 8 p.m. Thursday, December 10, 2020. As a result, the Proposed Revisions are preliminary in nature pending further review of the APA by DDMI, and further engagement with the interested parties. DDMI reserves its right to make further submissions with respect to the Proposed Revisions in light of its ongoing review of the APA.

**Croese Affidavit #6, *supra*, at paras. 4(a)-(c), (e).**

## **III. ISSUES**

DDMI’s position with respect to the issues to be determined is:

- (a) The AVO and APA should not be approved in their current forms in preference to accepting DDMI’s Proposed Revisions.

#### IV. ARGUMENT

##### A. APA Amendments

###### (i) *Definition of Diavik Realization Assets*

10. The APA currently defines “Diavik Realization Assets” as follows:

“3.1 Acquired Assets. Subject to the terms and conditions set forth in this Agreement, at the Closing, Sellers shall sell, assign, transfer and deliver to Purchaser, and Purchaser shall purchase, acquire and take assignment and delivery of, all of the Sellers’ right, title and interest in the assets and properties of Sellers other than the Excluded Assets (the “Acquired Assets”) subject to Section 3.6, free and clear of all Claims and Encumbrances of whatever kind or nature (other than Permitted Encumbrances), including the following:

...

(b) assignment of all of Sellers’ rights and interests in relation to the receipt of realizations and recoveries from or in respect of the Diavik Joint Venture Interest (including, without limitation, all receivables, diamond production entitlements, claims, sales proceeds, cash and other collateral given for the benefit of the First Lien Lenders or other persons, and other assets realized or realizable by or on behalf of Sellers) (collectively, the “Diavik Realization Assets”), which shall be assigned to Purchaser subject only to the continuing liens and charges of the First Lien Lenders pursuant to the Pre-filing Credit Agreement until such time as all letters of credit issued by the First Lien Lenders in respect of the Diavik Diamond Mine shall have been cash collateralized or cancelled and all related fees shall have been paid;

...”

**Application (Approval and Vesting and Stay Extension Orders), at Schedule “A” (Approval and Vesting Order) [“AVO”], at Schedule “A” (Asset Purchase Agreement dated as of December 6, 2020), at s. 3.1 [“APA”].**

11. The Proposed Revisions need to be viewed through the lens of the following undisputed facts. First, the assets conveyed by the Sellers to the Purchaser that relate to the Diavik Joint Venture are subject to the DDML Security. Second, the DDML Security under the Diavik Joint Venture ranks in priority to the security of the First Lien Lenders.

12. DDML’s Proposed Revisions seek to clarify that the term Diavik Realization Assets refers only to proceeds which are otherwise payable to Dominion Diamond from the Diavik Joint Venture. DDML also seeks confirmation that, in accordance with the terms of the Diavik Joint

Venture Agreement and the Intercreditor Agreements, the DDMI Security continues in the diamonds and proceeds which will be sold under the court-approved Monetization Process.

13. The First Lien Lenders are subordinate to DDMI insofar as it relates to the Cover Payment Security. The current draft of the APA, however, keeps the First Lien Lenders' security intact while at the same time purporting to extinguish the DDMI Security. This is an impermissible reordering of priorities.

14. In *U.S. Steel Canada Inc. (Re)*, the Ontario Court of Appeal stated:

***There is no support for*** the concept that the phrase "any order" in s. 11 provides ***an at-large equitable jurisdiction to reorder priorities*** or to grant remedies as between creditors. The orders reflected in the case law have addressed the business at hand: the compromise or arrangement.

*U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662 at para. 82.

15. The Diavik Joint Venture Agreement contains restrictions on the alienability of interests thereunder.

16. The Diavik Joint Venture Agreement defines "Transfer" as follows:

"1.29 "Transfer" means sell, grant, **assign**, encumber, pledge or otherwise commit or dispose of." [emphasis added].

[TAB 1, Diavik Joint Venture Agreement Excerpts].

17. Sections 15.1 and 15.2 of the Diavik Joint Venture Agreement address the Transfer of Participating Interests under the Diavik Joint Venture Agreement, and state:

**"15.1 General**

Each Participant shall have the right to Transfer to any third party all or any part of its Participating Interest solely as provided in this Article 15.

**15.2 Limitations on Free Transferability**

The Transfer right of a Participant in Section 15.1 shall be subject to the following terms and conditions:

- (a) no transferee of all or any part of the Participating Interest of a Participant, a Control Interest in a Participant or an Affiliate or the Net Profits Royalty shall have any rights hereunder unless and until the transferring Participant has provided to the other Participants notice of the Transfer, and except as provided in Section 15.2(d)

and 15.2(e), the transferee, as of the effective date of the Transfer, has committed in writing to be bound by this Agreement to the same extent as the transferring Participant;

- (b) ***no transfer permitted by this Article 15 shall relieve the transferring Participant of any liability***, whether accruing before or after such Transfer, ***which arises out of Operations conducted prior to such Transfer***;
- (c) in the event of a Transfer of less than all of a Participating Interest, the transferring Participant and its transferee shall act and be treated as one Participant;
- (d) if the Transfer is the grant of a security interest by mortgage, deed of trust, pledge, lien or other encumbrance of the Participating Interest or Net Profits Royalty of a Participant to secure a loan or other indebtedness, such security interest shall be subordinate to the terms of this Agreement and the rights and interests of the other Participants hereunder. Upon any foreclosure or other enforcement of rights in the security interest the acquiring third party shall be deemed to have assumed the position of the encumbering Participant with respect to this Agreement and the other Participants, and it shall comply with and be bound by the terms and conditions of this Agreement; and
- (e) ***if a sale or other commitment or disposition of Products or proceeds from the sale of Products by a Participant upon distribution to it pursuant to Article 11 creates in a third party a security interest in Products or proceeds therefrom prior to such distribution, such sales, commitment or disposition shall be subject to the terms and conditions of this Agreement.***" [emphasis added].

[TAB 1, Diavik Joint Venture Agreement Excerpts].

18. The import of section 15.2(e) is that with the assignment of the Diavik Realization Assets must comply with section 9.4 of the JVA, which provides that the DDMI Security in respect of Cover Payments shall rank prior to any and all other mortgages and security interests granted by or charging the property of Dominion Diamond.

[TAB 1, Diavik Joint Venture Agreement Excerpts].

**(ii) Definition of Business**

19. The APA contemplates a going concern transaction for the Ekati Mine, but the definition of "Business" is broader and includes the Diavik Mine business.



**(iii) Definition of Inventory**

20. The term “Inventory” is currently defined in the APA as follows:

“Inventory” means all diamonds and other inventory of any kind or nature, including stockpiles and goods, maintained, held or stored by or for any Seller, whether or not prepaid, and wherever located or held, including any goods in transit, and any prepaid deposits for any of the same, including all diamonds no longer held by DDMI prior to Closing in respect of the Diavik Joint Venture Interests and whose title has transferred to Sellers.”

**APA, *supra* at s. 1.1.**

21. The definition of “Inventory” in the APA is such that all of the Dominion Production (as defined in the Monetization Process), which constitute “diamonds ... maintained, held or stored by or for any Seller ... wherever located or held”, shall be vested in the Purchasers, free and clear of the DDMI Security. The approval of the APA including this definition and the accompanying vesting provisions would work the absurd result of vesting all of the Dominion Production free and clear of the Cover Payment Security. The Monitor, Sellers and First Lien Lenders have all advised that Inventory is not intended to apply to any collateral held at the PSF.

22. DDMI’s Proposed Revision expressly excludes the diamonds produced by the Diavik Mine, and other inventory of the Joint Venture of any kind or nature held at the PSF, or elsewhere, from the definition of Inventory.

**(iv) Definition of Permitted Encumbrances**

23. DDMI requires that the DDMI Security be added to the definition of Permitted Encumbrances in the same way and with the same rights afforded to the First Lien Lenders. The proceeds being conveyed by the Sellers to the Diavik Realization Assets are subject to the security interest in favour of DDMI, to the extent that any Cover Payment indebtedness remains outstanding.

**(v) The Diavik Joint Venture Interest, Diavik Mine, and Related Assets as Excluded Assets**

24. Pursuant to section 3.2 of the APA, the “Diavik Joint Venture Agreement” is an Excluded Asset. The APA does not include the Diavik Mine, nor the “Diavik Joint Venture Interest”, the

“Diavik Leases”, or the “Diavik Joint Venture” as Excluded Assets which creates ambiguity as to whether those interests are included.

**B. AVO Amendments**

**(i) *DDMI Security as a Permitted Encumbrance***

25. For the same reasons as set out above with respect to the APA, DDMI requires that the DDMI Security be added to the list of Permitted Encumbrances attached as Schedule “E” to the AVO.

26. In connection with this Proposed Revision, paragraph 14 of the AVO needs to be amended to provide DDMI with the same treatment as the First Lien Lenders, namely that DDMI's claims against the Sellers shall continue. This is necessary because paragraph 14 of the AVO currently provides that “[i]mmediately upon Closing ... the holders of the Permitted Encumbrances, other than the First Lien Lenders and their agents, shall have no claim whatsoever against the Monitor or the Sellers”.

**(ii) *Catch-All Provision Limiting Prejudice***

27. DDMI proposes adding a new paragraph 24 to the AVO, as a catch-all provision providing that nothing in the AVO or APA shall transfer, convey or assign the Sellers’ interest in the Diavik Joint Venture, or operate to prejudice, extinguish or otherwise affect the rights and remedies of DDMI under the Diavik Joint Venture Agreement.

**(iii) *The Break-Up Fee and Charge Should Not Prime the DDMI Security***

28. Section 20 of the AVO states:

The Break-Up Fee Charge shall rank in priority subsequent to the security securing both the (i) Charges; and (ii) indebtedness under the Pre-filing Credit Agreement.

**AVO, *supra* at para. 20.**

29. The “Pre-filing Credit Agreement” refers to Dominion Diamond's credit agreement with the First Lien Lenders. There is no reference to the priority of the DDMI Security, and no clarification that the Break Fee Charge applies only to the Acquired Assets under the APA. There is no reasonable justification for such a charge obtaining priority over the DDMI Security.

**C. The Proposed Revisions Are Consistent With the Parties' Relative Priorities and the Law Applicable to Liquidations**

30. The Monetization Process Order approved a liquidation of the DDMI Collateral. Liquidations must proceed in accordance with the relative priorities of creditors. As the Supreme Court of Canada stated in *Century Services Inc. v Canada (Attorney General)*:

“... Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, ***the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules.*** ...” [emphasis added].

*Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para. 12.

**D. Delivery of the DDMI Collateral to Dominion Diamond Does Not Extinguish the DDMI Security**

31. DDMI understands that the First Lien Lenders have taken the position that any DDMI Collateral delivered to Dominion Diamond pursuant to paragraph 16 of the SARIO shall be conveyed free and clear of the DDMI Security. That position is incorrect, and is contrary to the terms of the SARIO and the Order (Dismissal of Continuation of September 25 Order), issued on November 4, 2020 (the “**Dismissal Order**”); the *Personal Property Security Act*, SNWT 1994, c. 8; and, the well-established tenets of the law of secured transactions.

32. A security interest is perfected when it attaches and all steps for perfection have been completed, regardless of the order of occurrence. Registration of a financing statement perfects a security interest in collateral.

*Personal Property Security Act*, SNWT 1994, c. 8 at ss. 19, 25 [“NWT PPSA”].

33. Attachment occurs when value is given, the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party, and the security agreement has been signed.

NWT PPSA, *supra* at ss. 12(1), 10(1)(d)(i).

34. The security agreement has been signed and a financing statement has been registered. The DDMI Security is thus perfected as against the DDMI Collateral upon Dominion Diamond

obtaining rights in the DDMI Collateral pursuant to the Diavik Joint Venture Agreement and Splitting Protocol.

35. The First Lien Lenders have suggested that any excess collateral transferred to Dominion Diamond extinguishes the DDMI Security because title to the excess collateral will be transferred to Dominion Diamond upon delivery. Leaving aside, for the moment, the fact that title actually transfers once the Diamonds are split, title is irrelevant under the modern law of secured transactions. In *Re Giffen*, the Supreme Court of Canada stated:

“26 The Court of Appeal did not recognize that the provincial legislature, in enacting the PPSA, has set aside the traditional concepts of title and ownership to a certain extent. T. M. Buckwold and R. C. C. Cuming, in their article “The Personal Property Security Act and the Bankruptcy and Insolvency Act: Two Solitudes or Complementary Systems?” (1997), 12 Banking & Finance L. Rev. 467, at pp. 469-70, underline the fact that provincial legislatures, in enacting personal property security regimes, have redefined traditional concepts of rights in property:

Simply put, the property rights of persons subject to provincial legislation are what the legislature determines them to be. While a statutory definition of rights may incorporate common law concepts in whole or in part, it is open to the legislature to redefine or revise those concepts as may be required to meet the objectives of its legislation. This was done in the provincial PPSAs, which implement a new conceptual approach to the definition and assertion of rights in and to personal property falling within their scope. The priority and realization provisions of the Acts revolve around the central statutory concept of “security interest”. The rights of parties to a transaction that creates a security interest are explicitly not dependent upon either the form of the transaction or upon traditional questions of title. Rather, they are defined by the Act itself. [Emphasis added.]” [emphasis original].

*Re Giffen*, [1998] 1 SCR 91 at para. 26.

36. There is no requirement that a secured creditor maintain possession of assets subject to a security interest which has been perfected by registration, in order to preserve its security interest. The determinative factor is registration, except in cases where the secured party’s interest has been perfected solely by possession.

NWT PPSA, *supra* at ss. 23(1), 25.

37. Moreover, delivery of the DDMI Collateral to Dominion Diamond is not an ordinary course sale which would otherwise serve to extinguish the DDMI Security in the DDMI Collateral or its proceeds. The Dismissal Order is not a sale or lease; it is an order of this Honourable Court,

which implicitly recognizes the continued perfection of the DDMI Security by requiring that Dominion Diamond segregate, secure and retain in the Northwest Territories any DDMI Collateral delivered to it under the SARIO.

**Order (Dismissal of Continuation of September 25 Order), issued on November 4, 2020, at para. 3.**

**V. RELIEF REQUESTED**

38. DDMI respectfully requests that this Honourable Court approve the Proposed Revisions to the AVO and APA.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of December, 2020**

**McCarthy Tétrault LLP**

Per: “McCarthy Tétrault LLP”  
Sean F. Collins / Walker W. MacLeod / Pantelis Kyriakakis /  
Nathan Stewart  
Counsel for Diavik Diamond Mines (2012) Inc.

## **VI. LIST OF AUTHORITIES**

### **Evidence**

1. Diavik Joint Venture Agreement excerpts.

### **Cases**

2. *U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662;
3. *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60;
4. *Re Giffen*, [1998] 1 SCR 91.

### **Legislation**

5. *Personal Property Security Act*, SNWT 1994, c. 8.

# APPENDIX A

**ASSET PURCHASE AGREEMENT**

**BY AND AMONG**

**DDJ CAPITAL MANAGEMENT, LLC,**

**BRIGADE CAPITAL MANAGEMENT, LP,**

**DOMINION DIAMOND HOLDINGS, LLC,**

**DOMINION DIAMOND MINES ULC,**

**DOMINION DIAMOND DELAWARE COMPANY LLC,**

**DOMINION DIAMOND MARKETING CORPORATION,**

**DOMINION DIAMOND CANADA ULC**

**AND**

**DOMINION FINCO INC.**

**Dated as of December 6, 2020**



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## **ASSET PURCHASE AGREEMENT**

**THIS ASSET PURCHASE AGREEMENT** is dated as of December 6, 2020 (the “Effective Date”), by and among DDJ Capital Management, LLC (“DDJ”), Brigade Capital Management, LP (“Brigade”, and together with DDJ, the “Bidders” and each individually, a “Bidder”), Dominion Diamond Holdings, LLC, a Delaware limited liability company (“Dominion Holdings”), Dominion Diamond Mines ULC, a British Columbia unlimited liability company and a wholly owned subsidiary of Dominion Holdings (“DDM”), Dominion Diamond Delaware Company LLC, a Delaware limited liability company and a wholly owned subsidiary of DDM (“DDC”), Dominion Diamond Marketing Corporation, a wholly owned subsidiary of Dominion Holdings (“Dominion Marketing”), Dominion Diamond Canada ULC, a wholly owned subsidiary of DDC (“DDCU”), Dominion Finco Inc. (“Finco” and together with Dominion Holdings, DDM, DDC, Dominion Marketing and DDCU, the “Sellers”).

**WHEREAS**, DDM is a diamond producer with ownership interests in diamond projects in the Northwest Territories and Sellers are engaged, directly and indirectly through the Acquired Subsidiaries (as defined below), in the business of mining and selling rough diamonds extracted from the Ekati Diamond Mine to the global market (the “Business”);

**WHEREAS**, on April 22, 2020 (the “Filing Date”), the Sellers obtained an initial order (the “Initial Order”) under the Companies’ Creditors Arrangement Act (Canada) (“CCAA”) from the Alberta Court of Queen’s Bench (the “CCAA Court”) that, among other things, commenced the CCAA proceedings (the “CCAA Proceedings”) and granted an initial stay of proceedings in respect of the Sellers (the “Stay”). On May 1, 2020, the Sellers obtained an amended and restated version of the Initial Order from the CCAA Court (as further amended and restated from time to time, the “Amended and Restated Initial Order”) that, among other things, extended the Stay.

**WHEREAS**, the Bidders intend and have agreed to constitute one or more special purpose acquisition vehicles (the “Purchaser”) to purchase the Sellers’ right, title and interest in and to the Acquired Assets (as defined below) and assume the Assumed Liabilities (as defined below) on the terms and subject to the conditions set forth in this Agreement, subject to obtaining the Sale Order (as defined below) (the “Acquisition”);

**WHEREAS**, the Sellers and Bidders have agreed that, pending the constitution of the Purchaser, the Bidders shall have executed this Agreement on behalf of the Purchaser, who shall upon constitution, become a Party to and accept the terms and conditions of this Agreement and undertake to perform all of the obligations of and exercise all of the rights of the Purchaser under this Agreement; and

**WHEREAS**, the Parties desire to consummate the Acquisition as promptly as practicable following the satisfaction of the conditions precedent set out herein, including the issuance of the Sale Order.

**NOW, THEREFORE**, in consideration of the foregoing and the respective representations, covenants, agreements and warranties herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

## **ARTICLE I**

### **CERTAIN DEFINITIONS**

1.1 Specific Definitions. Capitalized terms used herein shall have the meanings set forth below:

“Aboriginal Agreements” shall have the meaning ascribed thereto in Section 5.16(a).

“Aboriginal Claims” means any and all claims (whether or not proven) by any Person, pursuant to section 35 of the *Constitution Act, 1982 Schedule B to the Canada Act, 1982* (U.K.) or otherwise, to or in respect of: (1) rights, title or interests of any Aboriginal Group by virtue of its status as an Aboriginal Group; (2) treaty rights; (3) Métis rights, title or interests; or (4) rights under land claims and agreements; or (5) specific or comprehensive claims being considered by the Government of Canada; and includes any alleged or proven failure of the Crown to have satisfied, prior to the date hereof, any of its duties to any claimant of any of the foregoing.

“Aboriginal Group” means any band (as defined in the *Indian Act* (Canada)), First Nation, Métis community, Inuit group, tribal council, band council or other aboriginal organization in Canada.

“Acquired Assets” shall have the meaning ascribed thereto in Section 3.1.

“Acquired Subsidiaries” shall have the meaning ascribed thereto in Section 3.1(a).

“Acquisition” shall have the meaning ascribed thereto in the Recitals of this Agreement.

“Action” means any litigation (in Law or in equity), arbitration, mediation, action, lawsuit, proceeding, written complaint, written charge, written claim, written demand, hearing, investigation or like matter (whether public or private) commenced, brought, conducted, or heard before or otherwise involving any Governmental Body, whether administrative, judicial or arbitral in nature.

“Advance Ruling Certificate” means an advance ruling certificate issued by the Commissioner pursuant to section 102 of the Competition Act with respect to the transactions contemplated by this Agreement.

“Affiliate” means, with respect to any Person, any other Person that, directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such Person, and the term “control” (including the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through ownership of voting securities, by Contract or otherwise. For the avoidance of doubt, none of the Bidders are, nor will the Purchaser be, an Affiliate of Sellers for purposes of this Agreement or otherwise.

“Agreement” means this Asset Purchase Agreement, including all Schedules hereto and the Seller Disclosure Letter, as it may be further amended from time to time in accordance with its terms.

“Allocation” shall have the meaning ascribed thereto in Section 13.14(e).



“Alternate Transaction” shall have the meaning ascribed thereto in Section 12.4(a).

“Amended and Restated Initial Order” shall have the meaning ascribed thereto in the Recitals of this Agreement.

“Ancillary Documents” means any certificate, agreement, document or other instrument (other than this Agreement) to be executed and delivered by a Party in connection with the consummation of the transactions contemplated by this Agreement.

“Antitrust Approvals” means the Competition Act Approval, if required, and each of the other Mandatory Antitrust Approvals (if any).

“Antitrust Laws” means the Competition Act and any competition, merger control and antitrust Law of any other applicable supranational, national, federal, state, provincial or local Law designed or intended to prohibit, restrict or regulate actions having the purpose or effect of monopolizing or restraining trade or lessening competition of any other country or jurisdiction, to the extent applicable to the transactions contemplated by this Agreement.

“Arbitrating Accountant” means an internationally recognized certified public accounting firm jointly selected by Purchaser and Sellers that is not then engaged to perform accounting, tax or auditing services for Sellers or Purchaser.

“Assigned Contracts” shall have the meaning ascribed thereto in Section 3.1(l).

“Assignment and Assumption Agreement” shall have the meaning ascribed thereto in Section 11.2(b).

“Assignment and Assumption of Leases” shall have the meaning ascribed thereto in Section 11.2(f).

“Assignment Order” means an Order of the CCAA Court made in the CCAA Proceedings, in form and substance acceptable to Parties, acting reasonably, assigning to the Purchaser the rights and obligations of Sellers under an Assigned Contract for which a consent, approval or waiver necessary for the assignment of such Assigned Contract has not been obtained.

“Assumed Liabilities” shall have the meaning ascribed thereto in Section 3.3.

“Assumed Plans” shall have the meaning ascribed thereto in Section 8.2(a).

“Authorization” means with respect to any Person, any order, permit, approval, consent, waiver, license, registration, qualification, certification or similar authorization of any Governmental Body having jurisdiction over the Person, and shall include all environmental permits, licenses and other Authorizations, and all surface leases and water or riparian rights, and for greater certainty in respect of the Sellers shall include the Environmental Agreement.

“Bidder Advisor” means Houlihan Lokey, Inc.

“Bidder Parties” means the Bidders and the Purchaser, collectively, and a “Bidder Party” refers to any of them.

"Bidder Related Party" means any former, current or future direct or indirect director, manager, officer, employee, agent or Affiliate of any of the Bidder Parties; any former, current or future, direct or indirect holder of any equity interests or securities of any of the Bidder Parties (whether such holder is a limited or general partner, member, stockholder, trust, trust beneficiary or otherwise); any former, current or future assignee of any of the Bidder Parties; any equity or debt financing source of any of the Bidder Parties; any former, current or future direct or indirect funds or accounts managed or advised by any of the Bidder Parties; or any former, current or future director, officer, trustee, beneficiary, employee, agent, Representative, Affiliate, advisor, general or limited partner, manager, member, stockholder, or assignee of any of the foregoing.

"Bidders" shall have the meaning ascribed thereto in the Preamble hereof. "Break-Up Fee" shall have the meaning ascribed thereto in Section 12.4(a). "Brigade" shall have the meaning ascribed thereto in the Preamble hereof.

"Budget" shall mean a budget of receipts and expenditures prepared by Sellers and approved by the Bidders on or prior to the Effective Date for the period up to Closing, as it may be amended and updated from time to time with the approval of the Bidders, acting reasonably.

"Business" shall have the meaning ascribed thereto in the Recitals of this Agreement.

"Business Day" shall mean any day other than a Saturday, a Sunday, or a statutory holiday in New York City, New York, U.S.A. or Calgary, Alberta, Canada.

"Canadian Assets" means all Acquired Assets other than the Purchaser Acquired Interests.

"Cash and Cash Equivalents" means all of Sellers' cash (including petty cash and checks received prior to the close of business on the Closing Date), checking account balances, marketable securities, certificates of deposits, time deposits, bankers' acceptances, commercial paper, security entitlements, securities accounts, commodity Contracts, commodity accounts, government securities and any other cash equivalents, whether on hand, in transit, in banks or other financial institutions, or otherwise held, and any security, collateral or other deposits.

"CCAA" shall have the meaning ascribed thereto in the Recitals of this Agreement. "CCAA Court" shall have the meaning ascribed thereto in the Recitals of this Agreement.

"CCAA Proceedings" shall have the meaning ascribed thereto in the Recitals of this Agreement.

"Claims" means any and all claims, charges, lawsuits, demands, directions, Orders, suits, inquires made, hearings, judgments, warnings, investigations, notices of violation, notice of noncompliance, litigation, proceedings, arbitration, or other disputes, whether civil, criminal, administrative, regulator or otherwise.

"Closing" shall have the meaning ascribed thereto in Section 11.1.

"Closing Cure Amount" means the Cure Amount in respect of Assigned Contracts which is payable on Closing, provided that in no event shall such aggregate amount exceed US\$10,500,000.

“Closing Date” means the date on which the Closing shall occur.

“Code” means the United States Internal Revenue Code of 1986, as amended.

“Collective Agreement” means any collective agreement, letter of understanding, letter of intent or any other similar Contract with or commitment to any trade union, employee association, labour organization or similar entity.

“Commissioner” means the Commissioner of Competition appointed under the Competition Act or any person duly authorized to exercise the powers and perform the duties of the Commissioner of Competition.

“Competition Act” means the *Competition Act* (Canada), as amended.

“Competition Act Approval” means: (i) the issuance of an Advance Ruling Certificate and such Advance Ruling Certificate has not been rescinded prior to Closing; or (ii) the Purchaser and the Sellers have given the notice required under section 114 of the Competition Act with respect to the transactions contemplated by this Agreement and the applicable waiting period under section 123 of the Competition Act has expired or has been terminated in accordance with the Competition Act; or (iii) the obligation to give the requisite notice has been waived pursuant to paragraph 113(c) of the Competition Act, and, in the case of (ii) or (iii), the Purchaser has been advised in writing by the Commissioner that, in effect, such person is of the view that sufficient grounds at that time do not exist to initiate proceedings before the Competition Tribunal under section 92 of the Competition Act with respect to the transactions contemplated by this Agreement and therefore the Commissioner, at that time, does not intend to make an application under section 92 of the Competition Act in respect of the transactions contemplated by this Agreement (“no-action letter”), and the form of and any terms and conditions attached to any such advice are acceptable to the Purchaser, acting reasonably, and such advice has not been rescinded prior to Closing.

“Competition Tribunal” means the Competition Tribunal established under the *Competition Tribunal Act* (Canada).

“Conditions Certificate” shall have the meaning ascribed thereto in Section 11.4. “Confidentiality Agreement” shall have the meaning ascribed thereto in Section 7.3.

“Contaminants” means any noise, heat, vibration or Hazardous Materials that can be discharged into or be present in the Environment.

“Contract” means any written or oral contract, purchase order, service order, sales order, indenture, note, bond, lease, sublease, license, understanding, instrument or other agreement, arrangement or commitment, whether express or implied.

“Cure Amount” means (i) with respect to any Assigned Contract for which a required consent to assignment has not been obtained and is to be assigned to the Purchaser in accordance with the terms of the Assignment Order, the amounts, if any, required to be paid to remedy all of the Sellers’ monetary defaults existing as at the Closing Date under such Assigned Contract (or such other amounts as may be agreed by the Purchaser and the counterparty to such Assigned Contract), and (ii) with respect to any Assigned Contract to be assigned on consent, where consent is required, the amount, if any, required to be paid to a counterparty to secure its consent to the assignment of the applicable Assigned Contract by

any of the Sellers to the Purchaser (which amount shall be set out on the form of contractual consent agreed to by the Purchaser and the counterparty to such Assigned Contract).

"Cure Funding Amount" means the aggregate of (i) the Closing Cure Amount and (ii) such other amount as may be required to satisfy the Cure Amount, provided that in no event shall the aggregate "Cure Funding Amount" be greater than US\$20,500,000.

"Data Room" means the material contained in the virtual data room established by Sellers in connection with the CCAA Proceedings as of 5:00 p.m. (Eastern time) on December 3, 2020.

"DDC" shall have the meaning ascribed thereto in the Preamble hereof.

"DDCU" shall have the meaning ascribed thereto in the Preamble hereof.

"DDJ" shall have the meaning ascribed thereto in the Preamble hereof.

"DDM" shall have the meaning ascribed thereto in the Preamble hereof.

"DDMI" means Diavik Diamond Mines (2012), Inc., a company incorporated under the laws of Canada, as the manager of the Diavik Joint Venture.

"Designated Purchaser" shall have the meaning ascribed thereto in Section 13.11.

"Diavik Diamond Mine" means the diamond mine located approximately 300 kilometres from Yellowknife in the Northwest Territories, Canada, and known as the "Diavik Diamond Mine."

"Diavik Joint Venture" means the unincorporated joint venture arrangement established pursuant to the Diavik Joint Venture Agreement in relation to the Diavik Diamond Mine.

"Diavik Joint Venture Agreement" means the joint venture agreement dated March 23, 1995 between DDM and DDMI originally entered into between Aber Resources Limited and Kennecott Canada Inc. as of March 23, 1995, as amended from time to time, with the current parties thereto being DDM and DDMI.

"Diavik Joint Venture Interest" means the undivided 40% beneficial interest in the assets (including property and products derived therefrom) of the Diavik Joint Venture held by DDM pursuant to the Diavik Joint Venture Agreement.

"Diavik Leases" means the surface and mining leases constituting the Diavik Diamond Mine and subject to the Diavik Joint Venture Agreement.

"Diavik Realization Account" shall have the meaning ascribed to it in Section 7.1(a)(iv).

"Diavik Realization Assets" shall have the meaning ascribed to it in Section 3.1(b).

"Documents" means all of Sellers' books, records and other information in any form relating to the Business or the Acquired Assets, including accounting books and records, sales and purchase records, lists of suppliers and customers, lists of potential customers, credit and pricing information, personnel and payroll records of Employees, Tax records, business reports, plans and projections, production reports and records, inventory reports and records, business,

engineering and consulting reports, marketing and advertising materials, research and development reports and records, maps, all plans, surveys, specifications, and as-built drawings relating to the Mine Properties, buildings, structures, erections, improvements, appurtenances and fixtures situate on or forming part of the Ekati Diamond Mine, the Diavik Diamond Mine and any other real property interests included in the Acquired Assets, including all such electrical, mechanical and structural drawings related thereto, environmental reports, soil and substratum studies, inspection records, financial records, and all other records, books, documents and data bases recorded or stored by means of any device, including in electronic form, relating to the Business, the Acquired Assets or the Employees, and other similar materials, in each case, whether in electronic, paper or other form, but excluding Sellers' corporate charter, minute and stock record books, and corporate seal.

"Dominion Holdings" shall have the meaning ascribed thereto in the Preamble hereof.

"Dominion Marketing" shall have the meaning ascribed thereto in the Preamble hereof.

"Effective Date" shall have the meaning ascribed thereto in the Preamble hereof.

"Ekati Buffer Zone" means the property and assets (including products derived from such property) comprising the Ekati Buffer Zone as described in the technical report entitled "Ekati Diamond Mine, Northwest Territories, Canada, NI-43-101 Technical Report" dated July 31, 2016.

"Ekati Buffer Zone Leases" means the surface and mining leases constituting the Ekati Buffer Zone.

"Ekati Core Zone" means the property and assets (including products derived from such property) that are the subject of the Ekati Core Zone Joint Venture Agreement.

"Ekati Core Zone Joint Venture" means the unincorporated joint venture arrangement established pursuant to the Ekati Core Zone Joint Venture Agreement in relation to the Ekati Core Zone.

"Ekati Core Zone Joint Venture Agreement" means the joint venture agreement titled 'Northwest Territories Diamonds Joint Venture Agreement – Core Zone Property' dated April 17, 1997 originally entered into among BHP Diamonds Inc., Dia Met Minerals Ltd., Charles E. Fipke and Dr. Stewart L. Blusson, as amended from time to time, with the current parties thereto being DDM and 1012986 B.C. Ltd.

"Ekati Core Zone Joint Venture Interest" means an undivided 88.889% beneficial interest in the Ekati Core Zone Joint Venture, held by DDM pursuant to the Ekati Core Zone Joint Venture Agreement.

"Ekati Core Zone Leases" means the surface and mining leases constituting the Ekati Core Zone and subject to the Ekati Core Zone Joint Venture Agreement.

"Ekati Diamond Mine" means the diamond mine located approximately 310 kilometres from Yellowknife in the Northwest Territories, Canada, and known as the "Ekati Diamond Mine."

"Employee" means an individual who, as of the applicable date, is employed by Sellers or their Subsidiaries in connection with the Business.

“Employee Plan” means all employee benefit, welfare, supplemental unemployment benefit, bonus, pension, profit sharing, executive compensation, current or deferred compensation, incentive compensation, stock compensation, stock purchase, stock option, stock appreciation, phantom stock option, savings, vacation pay, severance or termination pay, retirement, supplementary retirement, hospitalization insurance, salary continuation, legal, health or other medical, dental, life, disability or other insurance (whether insured or self-insured) plan, program, agreement or arrangement, including post-retirement health and life insurance benefit plans, and every other written or oral benefit plan, program, agreement or arrangement sponsored, maintained or contributed to or required to be contributed to by the Sellers or any of their Subsidiaries for the benefit of the Employees or former Employees and their dependents or beneficiaries by which the Sellers or any of their Subsidiaries are bound or with respect to which the Sellers or any of their Subsidiaries participate or have any actual or potential Liability (excluding, for greater certainty, any statutory benefits plan).

“Encumbrance” means any caveats, security interests or similar interests, hypothecations, pledges, mortgages, deeds, deeds of trust, liens, encumbrances, trusts or statutory, constructive or deemed trusts, reservations of ownership, title defects or imperfections, royalties, leases, options, rights including rights of pre-emption or first refusal, privileges, interests, assignments, easements, rights of way, encroachments, restrictive covenants, actions, demands, judgements, executions, levies, taxes, writs of enforcement, proxies, voting trusts or agreements, transfer restrictions under any shareholder agreement or similar agreements, charges, conditional sales or other title retention agreements or other impositions, restrictions on transfer or use of any nature whatsoever or other Claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise.

“Environment” means the components of the earth, and includes: (a) land, water, and air, including all layers of the atmosphere, (b) all organic and inorganic matter and living organisms, and (c) the interacting natural systems that include components referred to in paragraphs (a) and (b).

“Environmental Agreement” means the Environmental Agreement, dated as of January 6, 1997 as amended on April 14, 2003, on April 10, 2013 and on November 21, 2018 between Her Majesty The Queen in Right of Canada and the Government of the Northwest Territories and Dominion Diamond Ekati ULC.

“Environmental Law” means the Environmental Agreement and any Regulation which is related to or which regulates or otherwise imposes obligations, liability or standards of conduct concerning the Environment, health and safety, mineral resources, discharges, Contaminants, reclamation and restoration, Releases or threatened Releases of Contaminants, including Hazardous Materials, into the Environment or otherwise relating to the manufacture, processing, generation, distribution, use, treatment, storage, disposal, cleanup, transport or handling of Hazardous Materials.

“Environmental Liabilities and Obligations” means all Liabilities arising from or relating to the Environment, mineral resources, health or safety, Contaminants, reclamation and restoration or arising under any, or arising from any Environmental Law, including Liabilities related to: (a) the manufacture, processing, handling, generation, treatment, distribution, recycling, transportation, storage, use, cleanup, arrangement for disposal or disposal of, or exposure to, Hazardous Materials and/or Contaminants; (b) the Release of Hazardous Materials and/or Contaminants, including migration onto or from the real property included in



the Acquired Assets; (c) any other pollution or contamination of the surface, substrata, soil, air, ground water, surface water or marine environments; (d) any other obligations imposed under Environmental Law including pursuant to any applicable Authorizations issued pursuant to or under any Environmental Law; (e) Orders, notices to comply, notices of violation, alleged non-compliance and inspection reports with respect to any Liabilities pursuant to Environmental Law; and (f) all obligations with respect to personal injury, property damage, environmental damage, wrongful death, endangerment to the health or animal life, damage to plant life and other damages and losses arising under applicable Environmental Law.

“Essential Contracts” means, collectively, (i) the Aboriginal Agreements and related agreements, and (ii) those other Contracts to which a Seller is a party or beneficiary which are Material Contracts and specified as “Essential Contracts” on Schedule A, as may be modified from time to time after the date of this Agreement pursuant to Section 3.6.

“Excluded Assets” shall have the meaning ascribed thereto in Section 3.2.

“Excluded Contracts” means, collectively, those Contracts to which a Seller is a party or beneficiary and specified as “Excluded Contracts” on Schedule A, as may be modified from time to time after the date of this Agreement pursuant to Section 3.6.

“Excluded Liabilities” shall have the meaning ascribed thereto in Section 3.4.

“Filing Date” shall have the meaning ascribed thereto in the Recitals of this Agreement.

“Final Order” means an action taken or order issued by the CCAA Court or other applicable Governmental Body as to which: (i) no request or motion for stay of the action or order is pending, no such stay is in effect, and, if any deadline for filing any such request or motion is designated by statute or regulation, it is passed, including any extensions thereof; (ii) no petition or motion for rehearing or reconsideration of the action or order, or protest of any kind, is pending before the Governmental Body and the time for filing any such petition or motion is passed; (iii) the Governmental Body does not have the action or order under reconsideration or review on its own motion and the time for such reconsideration or review has passed; and (iv) the action or order is not then under judicial review or appeal, there is no notice of leave to appeal, appeal or other motion or application for judicial review pending, and the deadline for filing such notice of appeal or other motion or application for judicial review has passed, including any extensions thereof.

“Finco” shall have the meaning ascribed thereto in the Preamble hereof.

“First Lien Lenders” means the lenders under the Pre-filing Credit Agreement.

“First Lien Lender MSA” means the Mutual Support Agreement dated as of December 4, 2020 between the Bidders, Western Asset Management Company, LLC and the First Lien Lenders and attached hereto as Schedule B.

“Glowworm Lake Property” means the mineral leases held by DDM covering an area of 132,560 hectares bordering the eastern side of the Diavik Diamond Mine.

“GNWT” shall have the Government of the Northwest Territories.

“Governmental Body” means any government, quasi-governmental entity, or other governmental or regulatory body, board, commission, tribunal, agency or political subdivision thereof of any nature, whether national, international, multi-national, supra-national, foreign, federal, state, provincial, territorial, Aboriginal or local, or any agency, branch, department, official, entity, instrumentality or authority thereof, or any court or arbitrator (public or private) of applicable jurisdiction.

“GST” means goods and services tax, including harmonized sales tax, payable under the GST Legislation.

“GST Legislation” means Part IX of the *Excise Tax Act* (Canada), as amended from time to time.

“Guarantee” means any guarantee or other contingent liability, direct or indirect, with respect to any Indebtedness or obligations of another Person, through a Contract or otherwise.

“Hazardous Material” means any substance, material, emission or waste which is defined, regulated, listed or prohibited by any Governmental Body, including petroleum and its by-products, asbestos, polychlorinated biphenyls and any material, waste or substance which is defined or identified as a “hazardous waste,” “hazardous substance,” “hazardous material,” “restricted hazardous waste,” “industrial waste,” “solid waste,” “contaminant,” “dangerous good,” “deleterious substance,” “greenhouse gas emission,” “pollutant,” “toxic waste” or “toxic substance” or words of similar import or otherwise regulated under or subject to any provision of Environmental Law.

“IFRS” means generally accepted accounting principles as set out in the CPA Canada Handbook – Accounting for an entity that prepares its financial statements in accordance with International Financial Reporting Standards as applied by the International Accounting Standards Board, at the relevant time, applied on a consistent basis.

“Indebtedness” means, with respect to any Person, (a) all liabilities of such Person for borrowed money, whether secured or unsecured, including all outstanding principal, interest, fees and other amounts payable with respect thereto (including, for the avoidance of doubt, any prepayment penalties, make-whole payments or breakage fees associated with the payment of such borrowed money), (b) all liabilities of such Person evidenced by notes, debentures, bonds or similar instruments, including all outstanding principal, interest, fees and other amounts payable with respect thereto (including, for the avoidance of doubt, any prepayment penalties, make-whole payments or breakage fees associated with the payment thereof), for the payment of which such Person is responsible, (c) all obligations of such Person for the deferred purchase price of property or services (including “earn out” payments), all conditional sale obligations of such Person and all obligations of such Person under any title retention agreement, (d) all obligations of such Person for the reimbursement of any obligor on any letter of credit, banker’s acceptance or similar credit transaction, but excluding any obligations that are fully discharged at the Closing, (e) obligations under any interest rate, currency or other hedging arrangement or derivatives transaction, (f) all obligations of such Person with respect to the posting of collateral and similar obligations or as obligor, guarantor, surety or otherwise, including pursuant to “keep well” agreements, agreements to maintain or contribute cash or capital to any Person or other similar agreements or arrangements, but excluding any such obligations that are fully discharged at the Closing, and (g) any change of control payments or prepayment premiums, penalties, charges or equivalents thereof with respect to any obligations of the type referred to in clauses (a) through (f) that are required to be paid at the time of, or the



payment of which would become due and payable solely as a result of, the execution of this Agreement or the consummation of the transactions contemplated hereby.

"Indemnity Assumption" shall have the meaning ascribed thereto in Section 4.2(b).

"Initial Allocation" shall have the meaning ascribed thereto in Section 13.14(e).

"Initial Order" shall have the meaning ascribed thereto in the Recitals of this Agreement.

"Intellectual Property" means all intellectual property and proprietary rights of any kind, including the following: (a) trademarks, service marks, trade names, slogans, logos, designs, symbols, trade dress, internet domain names, uniform resource identifiers, rights in design, brand names, any fictitious names, d/b/a's or similar filings related thereto, or any variant of any of them, and other similar designations of source or origin, together with all goodwill, registrations and applications related to the foregoing; (b) copyrights and copyrightable subject matter (including works and any registration and applications for any of the foregoing); (c) trade secrets and other confidential or proprietary business information (including manufacturing and production processes and techniques, research and development information, technology, intangibles, drawings, specifications, designs, plans, proposals, technical data, financial, marketing and business data, pricing and cost information, business and marketing plans, customer and supplier lists and information), know how, proprietary processes, formulae, algorithms, models, industrial property rights, and methodologies, in each case whether patentable or not; (d) computer software, computer programs, and databases (whether in source code, object code or other form); (e) patents, industrial designs and inventions, together with all registrations and applications related to the foregoing; and (f) all rights to sue for past, present and future infringement, misappropriation, dilution or other violation of any of the foregoing and all remedies at law or equity associated therewith.

"Interim Facility" means the interim financing facility evidenced by the Interim Facility Credit Agreement, entered into to provide financing during the pendency of the CCAA Proceedings, as the same may be amended, restated or supplemented from time to time.

"Interim Facility Credit Agreement" means that certain Amended and Restated Interim Financing Term Sheet dated as of June 15, 2020 among Washington Diamond Lending, LLC, the other Interim Lenders party thereto, DDM, as the Borrower (as defined therein) thereunder, and the Guarantors (as defined therein), evidencing the Interim Facility to be provided by the Interim Lenders to DDM, as Borrower, as the same may be amended, modified or supplemented from time to time.

"Interim Lenders" means Washington Diamond Lending, LLC and the other Interim Lenders (as defined in the Interim Facility Credit Agreement), as interim lenders under the Interim Facility Credit Agreement and the Interim Facility and any assignee(s) thereof.

"Inventory" means all diamonds and other inventory of any kind or nature, including stockpiles and goods, maintained, held or stored by or for any Seller, whether or not prepaid, and wherever located or held, including any goods in transit, and any prepaid deposits for any of the same, ~~including all diamonds no longer held by DDMI prior to Closing in respect~~ but shall not include (i) diamonds produced from the Diavik Mine and other inventory of any kind or nature of the Diavik Joint Venture and held by DDMI at the Diavik Production Splitting Facility in Yellowknife, Northwest Territories pursuant to the terms of the Amended and Restated Initial Order at Closing; and (ii) diamonds produced from the Diavik Mine and other inventory of any

kind or nature of the Diavik Joint Venture ~~Interests and whose title has transferred to Sellers that has been transported by DDMI to Antwerp, Belgium pursuant to the terms of the Order (Approval of Monetization Process) issued in the CCAA Proceedings on November 4, 2020.~~

"Investment Canada Act" means the *Investment Canada Act*, as amended.

"IP Assignment and Assumption Agreement" shall have the meaning ascribed thereto in Section 11.2(g).

"Joint Venture" means each of the Diavik Joint Venture, the Ekati Core Zone Joint Venture and the Lac de Gras Joint Venture.

"Joint Venture Agreements" means, collectively, the Diavik Joint Venture Agreement, the Ekati Core Zone Joint Venture Agreement and the Lac de Gras Joint Venture Agreement, and "Joint Venture Agreement" means any one of them as applicable.

"Knowledge of Sellers" or "Sellers' Knowledge" means, with respect to any matter, the actual knowledge, after due inquiry, of each of the individuals set forth on Section 1.1(a) of the Seller Disclosure Letter.

"Lac de Gras" means the exploration property and assets (including products derived from such property) that is the subject of the Lac de Gras Joint Venture Agreement.

"Lac de Gras Joint Venture" means the unincorporated joint venture arrangement established pursuant to the Lac de Gras Joint Venture Agreement in relation to Lac de Gras.

"Lac de Gras Joint Venture Agreement" means the joint venture agreement dated June 30, 2015 entered into among Dominion Diamond Holdings Ltd., 6355137 Canada Inc. and North Arrow Minerals Inc.

"Lac de Gras Joint Venture Interest" means an undivided 77.31% beneficial interest in Lac de Gras Joint Venture held by DDM pursuant to the Lac de Gras Joint Venture Agreement.

"Lac de Gras Leases" means the surface and mining leases constituting Lac de Gras.

"Law" means any federal, territorial, state, provincial, local, municipal, foreign or international, multinational or other law, treaty, statute, constitution, principle of common law, resolution, ordinance, code, edict, decree, rule, regulation, ruling or requirement issued, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Body.

"Liability" means, as to any Person, any debt, Claim, liability (including any liability that results from, relates to or arises out of tort or any other product liability claim), duty, responsibility, obligation, commitment, assessment, cost, expense, loss, expenditure, charge, fee, penalty, fine, contribution or premium of any kind or nature whatsoever, whether known or unknown, asserted or unasserted, absolute or contingent, direct or indirect, accrued or unaccrued, liquidated or unliquidated, or due or to become due, and regardless of when sustained, incurred or asserted or when the relevant events occurred or circumstances existed.

“Mandatory Antitrust Approvals” means each of the approvals or consents of any Governmental Body, or the expiration of the applicable notice or waiting period, in each case required to consummate the Acquisition and the other transactions contemplated by this Agreement under applicable Antitrust Laws, including by means of a decision, in whatever form (including a declaration of lack of jurisdiction or a mere filing or notification, if the Closing can take place, pursuant to the applicable Antitrust Law, without a decision or the expiry of any waiting period) by any Governmental Body under the Antitrust Laws of any of any jurisdiction, authorizing or not objecting to the transactions contemplated by this Agreement, provided that any terms or conditions attached to such decision are acceptable to the Purchaser.

“Material Adverse Effect” means any event, occurrence, fact, condition, or change that is, or would reasonably be expected to become, individually or in the aggregate, materially adverse to: (a) the Business (other than in relation to the Diavik Joint Venture Interest), results of operations, condition (financial or otherwise), Acquired Assets or Assumed Liabilities of Sellers and their respective Subsidiaries, taken as a whole; or (b) the ability of Sellers to consummate the transactions contemplated hereby on a timely basis; provided, however, that, for the purposes of clause (a), a Material Adverse Effect shall not be deemed to include events, occurrences, facts, conditions or changes arising out of, relating to or resulting from: (i) changes generally affecting the economy or credit, financial, or securities markets; (ii) any outbreak or escalation of war or any act of terrorism; (iii) changes in applicable Law; (iv) changes in IFRS; (v) Sellers’ failure to meet internal or published projections, forecasts, or revenue or earnings predictions for any period (but, for the avoidance of doubt, not the underlying cause(s) of any such failure to the extent such underlying cause is not otherwise excluded from the definition of Material Adverse Effect); (vi) changes in political conditions; (vii) general conditions in the industry in which Sellers and their respective Subsidiaries operate; (viii) the announcement of the transactions contemplated by this Agreement; or (ix) the commencement or pendency of the CCAA Proceedings; provided further, however, that any event, change, and effect referred to in clauses (i), (ii), (iii), (iv), (vi) and (vii) immediately above shall be taken into account in determining whether a Material Adverse Effect has occurred or would reasonably be expected to occur to the extent that such event, change, or effect has a disproportionate effect on Sellers and their respective Subsidiaries, taken as a whole, compared to other participants in the industries in which Sellers and their respective Subsidiaries conduct their businesses.

“Material Contract” means any Contract:

(a) that if terminated or modified or if it ceased to be in effect, would reasonably be expected to have a Material Adverse Effect;

(b) that is a partnership agreement, limited liability company agreement, joint venture agreement or similar agreement or arrangement, including the Joint Venture Agreements, relating to the formation, creation or operation of any partnership, limited liability company or joint venture in which Sellers or any of their Subsidiaries is a partner, member or joint venturer (or other participant) that is material to Sellers, their Subsidiaries or the Business, or the ability of Sellers and their Subsidiaries to develop any of their material projects, but excluding any such partnership, limited liability company or joint venture which is a wholly-owned Subsidiary of Sellers;

(c) under which Indebtedness for borrowed money in excess of \$7,500,000 is or may become outstanding or pursuant to which any property or asset of Sellers or their Subsidiaries is mortgaged, pledged or otherwise subject to an Encumbrance securing

Indebtedness for borrowed money in excess of \$7,500,000 or under which Sellers or any of their Subsidiaries has guaranteed any liabilities or obligations of a third party in excess of \$7,500,000, in each case, other than any such Contract between two or more wholly-owned Subsidiaries of Sellers or between Sellers and/or one or more of their wholly-owned Subsidiaries;

(d) under which Sellers or any of its Subsidiaries is obligated to make or expects to receive payments in excess of \$7,500,000 over the remaining term;

(e) that creates an exclusive dealing arrangement or right of first offer or refusal;

(f) providing for the purchase, sale or exchange of, or option to purchase, sell or exchange, any property or asset where the purchase or sale price or agreed value or fair market value of such property or asset exceeds \$15,000,000;

(g) that is a Collective Agreement;

(h) that limits or restricts in any material respect (a) the ability of Sellers or any of their Subsidiaries to incur Indebtedness, to engage in any line of business or carry on business in any geographic area, to compete with any Person, or to engage in any merger, consolidation or other business combination, or (b) the scope of Persons to whom Sellers or any of their Subsidiaries may sell products;

(i) between Sellers or any of their Subsidiaries, on the one hand, and any director or executive officer of the Sellers or any of their Subsidiaries, on the other hand;

(j) with any Aboriginal Group or Aboriginal business, including a joint venture in which an Aboriginal Group is a joint venture party;

(k) providing for the sale of diamonds representing more than 1% of annual production of Sellers and their Subsidiaries or pursuant to which Sellers and their Subsidiaries received during calendar year 2019 or could reasonably be expected to receive in calendar year 2020 or thereafter revenues in excess of \$15,000,000;

(l) providing for indemnification by Sellers or their Subsidiaries of another Person, other than Contracts for goods or services, Contracts with directors or officers of Sellers or their Subsidiaries in their capacity as such or Contracts which provide for indemnification obligations of less than \$15,000,000;

(m) providing for a royalty, streaming or similar arrangement or economically equivalent arrangement in respect of any of the Mine Properties; or

(n) that is or would reasonably be expected to be material to Sellers and their Subsidiaries, the Business (other than in relation to the Diavik Joint Venture Interest) or the Acquired Assets, taken as a whole.

"Mine Properties" means, collectively, the Diavik Diamond Mine and the Ekati Diamond Mine and "Mine Property" means any one of them as applicable.

"Mineral Rights" has the meaning ascribed thereto in Section 5.13(a).

“Monitor” means FTI Consulting Canada Inc., in its capacity as the CCAA Court-appointed monitor in connection with the CCAA Proceedings.

“Monitor’s Certificate” means the certificate, substantially in the form attached as Schedule “A” to the Sale Order, to be delivered by the Monitor to the Sellers and the Bidder Parties on Closing and thereafter filed by the Monitor with the CCAA Court, certifying that the Monitor has received the Conditions Certificates.

“Objection Notice” shall have the meaning ascribed thereto in Section 13.14(e).

“Order” means any decree, order, injunction, rule, judgment, consent, ruling, writ, assessment or arbitration award of or by any court or Governmental Body.

“Ordinary Course of Business” means, with respect to any Person, actions that (i) are taken in the ordinary and usual course of operations of the Business consistent with past practice in effect prior to filing of the CCAA Proceedings and prior to the enactment of measures taken in response to the COVID-19 pandemic, (ii) are taken in accordance with all applicable Laws and (iii) do not result from or arise out of and were not caused by, any breach of Contract, breach of warranty, tort, infringement or violation of Law by such Person or any Affiliate of such Person.

“Organizational Documents” means, with respect to a particular entity Person, (a) if a corporation, the articles or certificate of incorporation and bylaws, (b) if a general partnership, the partnership agreement and any statement of partnership, (c) if a limited partnership, the limited partnership agreement and certificate of limited partnership, (d) if a limited liability company, the articles or certificate of organization or formation and any limited liability company or operating agreement, (e) if another type of Person, all other charter and similar documents adopted or filed in connection with the creation, formation or organization of the Person, and (f) all amendments or supplements to any of the foregoing.

“Other Contracts” means, collectively, those Contracts to which a Seller is a party or beneficiary and specified as “Other Contracts” on Schedule A, as may be modified from time to time after the date of this Agreement pursuant to Section 3.6.

“Outside Date” shall have the meaning ascribed thereto in Section 12.1(b)(i).

“Parent” means Washington Diamond Investments, LLC.

“Parties” means at a given time, the parties to this Agreement, collectively and a “Party” refers to any of them.

“Permitted Encumbrances” means, as of any particular time and in respect of any Person, each of the following Encumbrances: (1) any subsisting restrictions, exceptions, reservations, limitations, provisos and conditions (including royalties, reservation of mines, mineral rights and timber rights, access to navigable waters and similar rights) expressed in any original grant from the Crown or a Governmental Body and any statutory limitations, exceptions, reservations and qualifications to title or Encumbrances imposed by Law; (2) any claim by any Aboriginal Group based on treaty rights, traditional territory, land claims or otherwise; (3) inchoate or statutory liens solely with respect to Assumed Liabilities not at the time overdue; (4) permits, reservations, covenants, servitudes, watercourse, rights of water, rights of access or user licenses, easements, rights-of-way and rights in the nature of easements (including,

without in any way limiting the generality of the foregoing, licenses, easements, rights-of-way and rights in the nature of easements for railways, sidewalks, public ways, sewers, drains, gas and oil pipelines, steam and water mains or electric light and power, or telephone and telegraph conduits, poles, wires and cables) in favor of any Governmental Body or utility company in connection with the development, servicing, use or operation of any property which (y) do not individually or in the aggregate materially detract from the value or materially interfere with the use of the real or immovable property subject thereto and (z) have been complied with to date in all material respects; (5) each of the following Encumbrances: (a) permits, reservations, covenants, servitudes, rights of access or user licenses, easements, rights of way and rights in the nature of easements in favor of any Person (other than those in (4) above); (b) any encroachments, title defects or irregularities existing; (c) any instrument, easement, charge, caveat, lease, agreement or other document registered or recorded against title to any property so long as same have been complied with in all material respects; (d) agreements with any Governmental Body and any public utilities or private suppliers of services; and (e) restrictive covenants, private deed restrictions, and other similar land use control agreements; in each of (a), (b), (c), (d) and (e), which (I) do not individually or in the aggregate materially detract from the value or materially interfere with the use of the real or immovable property subject thereto and (II) have been complied with to date in all material respects; (6) Encumbrances granted or arising pursuant to the Joint Venture Agreements included in [or with respect to](#) the Acquired Assets; (7) Encumbrances in respect of all equipment and other tangible assets of Sellers (including all vehicles) which are subject to any true lease, financing lease, conditional sales contract, or similar agreement that is an Assigned Contract; (8) miner's liens and associated certificates of pending litigation filed by trade creditors party to Assigned Contracts who have agreed that certain Cure Amounts owed to them will be paid after the Closing Date; (9) Encumbrances to which the Purchaser consents in writing; (10) in respect of only the Diavik Realization Assets, Encumbrances that are held by or for the benefit of [DDMI pursuant to the Diavik Joint Venture and](#) the First Lien Lenders pursuant to the Pre-filing Credit Agreement; and (11) Encumbrances set out in the schedules to the Sale Order.

"Person" means any corporation, partnership, joint venture, limited liability company, unlimited liability company, organization, entity, authority or natural person.

"Pre-Closing Period" means the period commencing on the Effective Date and ending on the earlier of the date upon which this Agreement is validly terminated pursuant to Article XII or the Closing Date.

"Pre-Closing Tax Period" means any taxable period (or portion thereof) ending on or before the Closing Date and any portion of any Straddle Period ending on the Closing Date.

"Pre-filing Credit Agreement" means the Revolving Credit Agreement, dated as of November 1, 2017 (as amended by the First Amendment and Waiver to Credit Agreement, dated as of July 30, 2019, the Second Amendment, dated as of March 4, 2020, and as further amended from time to time), among DDM, Parent, the lenders from time to time party thereto and Credit Suisse AG, Cayman Islands Branch, as administrative agent.

"Pre-filing Indebtedness Assumption" shall have the meaning ascribed thereto in [Section 4.2\(a\)](#).

"Pre-filing Indenture" means the Indenture, dated as of October 23, 2017, by and among Northwest Acquisitions ULC, Finco and Wilmington Trust, National Association, as trustee (the "Indenture Trustee"), as supplemented by (i) the First Supplemental Indenture, dated as of



November 1, 2017, by and among the Northwest Acquisitions ULC, Finco, the guarantors party thereto and the Indenture Trustee, (ii) the Second Supplemental Indenture, dated as of December 21, 2017, by and among Northwest Acquisitions ULC, as successor of Northwest Acquisitions ULC, Finco and the Indenture Trustee, (iii) the Third Supplemental Indenture, dated as of December 21, 2017, by and among DDM, as successor of Northwest Acquisitions ULC, Finco and the Indenture Trustee, (iv) the Fourth Supplemental Indenture, dated as of January 1, 2019, by and among the Indenture Trustee, Finco, DDM, and the guarantors party thereto, and (v) the Fifth Supplemental Indenture, dated as of December 13, 2019, by and among DDM, Finco, Parent, Dominion Diamond Holdings, LLC, and the Indenture Trustee.

"Previously Omitted Contract" shall have the meaning ascribed thereto in Section 3.6(b)(i).

"Previously Omitted Contract Designation" shall have the meaning ascribed thereto in Section 3.6(b)(i).

"Previously Omitted Contract Notice" shall have the meaning ascribed thereto in Section 3.6(b)(ii).

"Purchase Price" shall have the meaning ascribed thereto in Section 4.1.

"Purchaser" shall have the meaning ascribed thereto in the Preamble to this Agreement.

"Purchaser Acquired Interests" means shares of, or other equity interests in, the Acquired Subsidiaries.

"Purchaser's Conditions Certificate" shall have the meaning ascribed thereto in Section 11.4.

"Regulation" means any Law, statute, regulation, code, guideline, protocol, policy, ruling, rule or Order of, administered or enforced by or on behalf of any Governmental Body and all judgments, orders, writs, injunctions, decisions and mandate of any Governmental Body which, although not actually having the force of law, are considered by such Governmental Body as requiring compliance as if having the force of law or which establish the interpretative position of the Law by such Governmental Body.

"Release" means any release, spill, deposit, emission, leaking, pumping, escape, emptying, leaching, seeping, disposal, discharge, dispersal or migration into the indoor or outdoor environment or into or out of any property or assets (including the Acquired Assets) owned or leased by any Seller as at the Closing Date, including the movement of Contaminants, including Hazardous Materials, through or in the air, soil, ground, surface water, groundwater or property.

"Representatives" means the officers, employees, legal counsel, accountants and other authorized representatives, agents and contractors of any Person.

"Retained Subsidiaries" shall have the meaning ascribed thereto in Section 3.2(a).

"Sale Advisor" means Evercore Group LLC.

“Sale Order” means an Order of the CCAA Court in form and content satisfactory to the Sellers and the Bidders, acting reasonably, approving the transactions contemplated by this Agreement, vesting the Acquired Assets in the Purchaser free and clear of all Encumbrances other than the Permitted Encumbrances and containing such other provisions as the Sellers or the Bidders may reasonably require.

“Second Lien Notes” means the secured second lien notes issued under and pursuant to the Pre-filing Indenture.

“Seller Disclosure Letter” means the disclosure letter delivered by Sellers to Purchaser on or prior to December 11, 2020 in form and content satisfactory to the Bidders, acting reasonably.

“Sellers” shall have the meaning ascribed thereto in the Preamble hereof.

“Sellers’ Conditions Certificate” shall have the meaning ascribed thereto in Section 11.4.

“Stay” shall have the meaning ascribed thereto in the Recitals of this Agreement.

“Straddle Period” shall have the meaning ascribed thereto in Section 13.14(b).

“Subsidiary” means, with respect to any Person, any corporation, limited liability company, unlimited liability company, public liability company, private limited company, joint venture, partnership or other entity of which such Person (a) beneficially owns, either directly or indirectly, more than fifty percent (50%) of (i) the total combined voting power of all classes of voting securities of such entity, (ii) the total combined equity interests, or (iii) the capital or profit interests, in the case of a partnership; or (b) otherwise has the power to vote or to direct the voting of sufficient securities to elect a majority of the board of directors or similar governing body.

“Sureties” means those parties defined as Sureties in the Sureties Support Confirmations.

“Sureties Support Confirmations” means the confirmations of support from the Sureties to the Bidders dated December 4, 2020 and delivered confidentially to Sellers.

“Tax Act” means the *Income Tax Act* (Canada) and the regulations promulgated thereunder, as amended from time to time.

“Tax Return” means any report, return, information return, election, agreement, declaration, designation, filing or other document of any nature or kind required to be filed with any applicable Governmental Body in respect of Taxes, including any amendment, schedule, attachment or supplement thereto and whether in tangible or electronic form.

“Taxes” means all taxes, charges, fees, duties, levies or other assessments, including, without limitation, income, gross receipts, net proceeds, ad valorem, turnover, real and personal property (tangible and intangible), sales, use, franchise, excise, value added (including GST), capital, license, payroll, employment, employer health, unemployment, pension, environmental, customs duties, capital stock, disability, stamp, leasing, lease, user, transfer (including land registration or transfer), fuel, excess profits, occupational and interest equalization, windfall profits, severance and withholding and social security taxes imposed by Canada, the United



States or any other country or by any state, province, territory, municipality, subdivision or instrumentality of Canada or the United States or of any other country or by any other Governmental Body, and employment or unemployment insurance premiums, Canada Pension Plan or Quebec Pension Plan contributions, together with all applicable penalties and interest, and such term shall include any interest, penalties or additions to tax attributable to such Taxes.

A “third party” means any Person other than any Seller, Bidder Party or any of their respective Affiliates.

“Transfer Taxes” shall have the meaning ascribed thereto in Section 13.14(a).

“Transferred Employees” shall have the meaning ascribed thereto in Section 8.1(a).

“Treasury Regulations” means the regulations promulgated under the Code by the United States Department of the Treasury (whether in final, proposed or temporary form), as the same may be amended from time to time.

“US\$” means the currency of the United States, and all references to monetary amounts herein shall be in Dollars unless otherwise specified herein.

“Wind-Down Account” shall have the meaning ascribed thereto in Section 7.1(a)(iii).

“Working Capital Financing” shall have the meaning ascribed thereto in Section 4.3.

1.2 Other Terms. Other terms may be defined elsewhere in the text of this Agreement and, unless otherwise indicated, shall have such meaning through this Agreement.

1.3 Other Definitional Provisions.

(a) The words “hereof,” “herein,” and “hereunder” and words of similar import, when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement.

(b) The terms defined in the singular shall have a comparable meaning when used in the plural, and vice versa.

(c) References herein to a specific Section, Subsection or Schedule shall refer, respectively, to Sections, Subsections or Schedules of this Agreement, unless the express context otherwise requires.

(d) Accounting terms which are not otherwise defined in this Agreement have the meanings given to them under IFRS consistently applied. To the extent that the definition of an accounting term defined in this Agreement is inconsistent with the meaning of such term under IFRS, the definition set forth in this Agreement will control.

(e) Any reference to any agreement or Contract will be a reference to such agreement or Contract, as amended, modified, supplemented or waived.

(f) Any provision of this Agreement that requires the Bidder Parties to act reasonably shall not be deemed to require the Bidder Parties to accept, agree or consent to any Order or supplement, amendment or modification thereto, or any other matter that adversely

affects such Bidder Parties or is inconsistent with the terms of this Agreement, in each case, other than in any de minimis respect.

(g) Any provision of this Agreement that requires any Party to use commercially reasonable efforts to satisfy conditions to Closing having a sole discretion standard do not require such Party to accept any term or agreement not acceptable to such Party in its sole discretion.

(h) Wherever the word “include,” or “includes,” or “including” is used in this Agreement, it shall be deemed to be followed by the words “without limitation.”

## **ARTICLE II**

### **FORMATION OF PURCHASER; BIDDERS’ COVENANT**

2.1 Formation. The Bidders shall use commercially reasonable efforts to take all steps, deliver all documents and comply with all requirements, as soon as reasonably practicable, to ensure that Purchaser is formed in accordance with applicable Law and pursuant to the terms and conditions of this Agreement. The Bidders shall cause the Purchaser to enter into and accept the terms and conditions under this Agreement.

2.2 Purpose of Purchaser. Purchaser shall be formed with the purpose and objects as would facilitate the due exercise and performance by Purchaser of the rights and obligations under this Agreement set out in respect of the “Purchaser” and for undertaking such other activities as are necessary for or incidental to the transactions contemplated by this Agreement.

2.3 Bidders’ Covenant. The Bidders shall, or shall cause the Purchaser to, purchase the Acquired Assets, satisfy the Purchase Price (including, to the extent necessary, funding all or a portion of the Closing Cure Amount from the Working Capital Financing) and provide the Working Capital Financing and otherwise consummate the transactions contemplated hereby, subject to the terms and conditions of this Agreement.

2.4 First Lien Lender MSA. The Bidders shall comply with their obligations pursuant to the First Lien Lender MSA. The Bidders shall use reasonable best efforts to have executed and delivered the definitive documentation, in form and content satisfactory to the First Lien Lenders and the Bidders, regarding the transactions between such parties contemplated by the First Lien Lender MSA prior to the Outside Date in satisfaction of the condition set out in Section 9.15.

2.5 Sureties Support Confirmations. The Bidders shall use reasonable best efforts to have executed and delivered the definitive documentation, in form and content satisfactory to the Sureties and the Bidders, regarding the transactions contemplated by the Sureties Support Confirmations prior to the Outside Date in satisfaction of Section 9.9.

## **ARTICLE III**

### **PURCHASE AND SALE; ASSUMPTION OF CERTAIN LIABILITIES**

3.1 Acquired Assets. Subject to the terms and conditions set forth in this Agreement, at the Closing, Sellers shall sell, assign, transfer and deliver to Purchaser, and Purchaser shall purchase, acquire and take assignment and delivery of, all of the Sellers’ right, title and interest in the assets and properties of Sellers other than the Excluded Assets (the “Acquired Assets”)

subject to Section 3.6, free and clear of all Claims and Encumbrances of whatever kind or nature (other than Permitted Encumbrances), including the following:

(a) all of the issued and outstanding equity interests held by any Seller in Dominion Diamond (India) Private Limited, Dominion Diamond Marketing N.V., Dominion Diamond (Cyprus) Limited and, if and to the extent elected by the Bidders before Closing, in another Seller (collectively, the "Acquired Subsidiaries");

(b) assignment of all of Sellers' rights and interests in ~~relation to the receipt of realizations and recoveries from or in respect~~ proceeds from Products (as such term is defined in the Diavik Joint Venture Agreement) upon distribution to the Sellers pursuant to Article 11 of the Diavik Joint Venture Interest Agreement (including, without limitation, all proceeds from receivables, diamond production entitlements, claims, sales proceeds, cash ~~and other collateral given for the benefit of the First Lien Lenders or other persons~~, and other assets realized or realizable by or on behalf of Sellers) (collectively, the "Diavik Realization Assets"), which shall be assigned to Purchaser subject only to (i) the terms and conditions of the Diavik Joint Venture Agreement, including the continuing liens and charges of DDMI pursuant to the Diavik Joint Venture Agreement; and (ii) the First Lien Lenders pursuant to the Pre-filing Credit Agreement until such time as all letters of credit issued by the First Lien Lenders in respect of the Diavik Diamond Mine shall have been cash collateralized or cancelled and all related fees shall have been paid;

(c) the Ekati Core Zone Joint Venture Interest, all rights and interests of any Seller under the Ekati Core Zone Joint Venture Agreement, and all other rights, title and interests of any Seller in the Ekati Diamond Mine, the Ekati Core Zone, the Ekati Core Zone Leases and the Ekati Core Zone Joint Venture;

(d) all rights, title and interests of any Seller in the Ekati Buffer Zone and the Ekati Buffer Zone Leases;

(e) the Lac de Gras Joint Venture Interest, all rights and interests of any Seller under the Lac de Gras Joint Venture Agreement, and all other rights, title and interests of any Seller in the Lac de Gras Leases and the Lac de Gras Joint Venture;

(f) all mineral rights held by DDM, including all mineral rights included in the Ekati Core Zone, the Ekati Buffer Zone, Lac de Gras and the Glowworm Lake Property;

(g) all of Sellers' Cash and Cash Equivalents, including all cash collateral and deposits posted by or for the benefit of Sellers as security for any letter of credit, surety or other bond, rent, utilities, contractual obligations or otherwise (except for retainers held by any professional in the CCAA Proceedings);

(h) all trade and non-trade accounts receivable, notes receivable and negotiable instruments of Sellers, including all intercompany receivables, notes, rights and claims from any Acquired Subsidiary and payable or in favor of a Seller provided, however, that all receivables in respect of the Diavik Joint Venture Interest collected by the Sellers following the Effective Date shall constitute Diavik Realization Assets;

(i) all prepaid charges and expenses, including all prepaid rent and all prepaid charges, expenses and rent under any personal property leases;

(j) all equipment and other tangible assets of Sellers, including all vehicles, tools, parts and supplies, fuel, machinery, furniture, furnishing, appliances, fixtures, office equipment and supplies, owned and licensed computer hardware and related documentation, stored data, communication equipment, trade fixtures and leasehold improvements, in each case, with any transferable warranty and service rights of any Seller related thereto;

(k) all Inventory;

(l) subject to Section 3.6, all of the Essential Contracts and Other Contracts set forth on Schedule A hereto (the “Assigned Contracts”) and all rights thereunder;

(m) all Authorizations and all pending applications therefor, in each case, to the extent such Authorizations and pending applications therefor are transferrable;

(n) all rights, options, Claims or causes of action of any Seller or other applicant against any party arising out of events occurring prior to the Closing, including and, for the avoidance of doubt, arising out of events occurring prior to the Filing Date, and including (i) any rights under or pursuant to any and all warranties, representations and Guarantees made by suppliers, manufacturers and contractors relating to products sold, or services provided, to Sellers, and (ii) any and all causes of action under applicable Law;

(o) all other right, title and interest of any Seller in real property (including and all fixtures, improvements and appurtenances thereto);

(p) all Assumed Plans, together with all funding arrangements relating thereto (including but not limited to all assets, trusts, insurance policies and administration service contracts related thereto), and all rights and obligations thereunder;

(q) all personnel files for Transferred Employees except as prohibited by Law; provided, however, that Sellers have the right to retain copies at Sellers’ expense to the extent required by Law;

(r) any chattel paper owned or held by Sellers;

(s) any lock boxes to which account debtors of any Seller remit payment relating to the Business, the Assumed Liabilities or the Acquired Assets;

(t) the Intellectual Property owned or purported to be owned by any Seller;

(u) all goodwill, payment intangibles and general intangible assets and rights of Sellers to the extent associated with the Business, the Assumed Liabilities or the Acquired Assets;

(v) to the extent permitted by Law, Sellers’ Documents; provided, however, that Sellers have the right to retain copies of all of the foregoing at Sellers’ expense to the extent required by Law or as is necessary to wind-down Sellers;

(w) to the extent transferable, all rights and obligations under or arising out of all insurance policies relating to the Business or any of the Acquired Assets or Assumed

Liabilities (including returns and refunds of any premiums paid, or other amounts due back to any Seller, with respect to cancelled policies);

(x) all rights and obligations under non-disclosure, confidentiality, non-competition, non-solicitation and similar arrangements with (or for the benefit of) former or current employees and agents of Sellers or with third parties (including any non-disclosure, confidentiality agreements or similar arrangements entered into in connection with or in contemplation of the filing of the CCAA Proceedings);

(y) telephone, fax numbers (if any) and email addresses, as well as the right to receive mail and other communications addressed to Sellers;

(z) any claim, right or interest of Sellers in or to any refund, rebate, credit, abatement or recovery for Taxes, together with any interest due thereon or penalty rebate arising therefrom (to the extent that any such refund, rebate, credit, abatement or recovery for Taxes is received by the Sellers in the form of payment, Sellers agree that they will hold all such amounts in trust for the Purchaser and will pay such amounts to the Purchaser forthwith following receipt thereof);

(aa) all prepaid Taxes and Tax credits of Sellers (to the extent that any such refund, rebate, credit, abatement or recovery for Taxes is received by the Sellers in the form of payment, Sellers agree that they will hold all such amounts in trust for the Purchaser and will pay such amounts to the Purchaser forthwith following receipt thereof);

(bb) all of Sellers' bank accounts (excluding the Diavik Realization Account and the Wind-Down Account); and

(cc) all other or additional assets, properties, privileges, rights and interests of Sellers relating to the Business, the Assumed Liabilities or the Acquired Assets (other than any Excluded Assets) of every kind and description and wherever located, whether known or unknown, fixed or unfixed, accrued, absolute, contingent or otherwise, and whether or not specifically referred to in this Agreement.

3.2 Excluded Assets. Notwithstanding anything in this Agreement to the contrary, the Acquired Assets shall not include any of the following (collectively, the "Excluded Assets");

(a) the Diavik Diamond Mine;

(b) the Diavik Joint Venture;

(c) ~~(a)~~ the Diavik Joint Venture Agreement;

(d) the Diavik Joint Venture Interest;

(e) the Diavik Leases;

(f) ~~(b)~~ subject to Section 3.1(a), all shares of capital stock or other equity interests in, or securities convertible into, exchangeable or exercisable for any such shares of capital stock or other equity interests in, Dominion Finco Inc., Dominion Diamond Delaware Company LLC, Dominion Diamond Canada ULC and Dominion Diamond (Cyprus) Limited (the "Retained Subsidiaries");

(g) ~~(e)~~ all Excluded Contracts;  
(h) ~~(d)~~ Sellers' rights under this Agreement, and under any Ancillary Documents;

(i) ~~(e)~~ all current and prior director and officer insurance policies of Sellers and all rights of any nature with respect thereto running in favor of any Seller, including all insurance recoveries thereunder and rights to assert Claims with respect to any such insurance recoveries, in each case, as the same may run in favor of any Seller and arising out of actions taking place prior to the Closing Date;

(j) ~~(f)~~ all equipment and other tangible assets of Sellers (including all vehicles) which are subject to any financing lease, true lease, conditional sales contract or similar agreement that is not an Assigned Contract;

(k) ~~(g)~~ all assets that are removed from the Acquired Assets pursuant to Section 3.6 or by designation of Bidders or Purchaser prior to Closing; and

(l) ~~(h)~~ Sellers' Organizational Documents, corporate charter, minute and stock record books, income tax returns and corporate seal; provided that Purchaser shall have the right to reasonably request, and Sellers shall reasonably cooperate to provide, copies of any portions of such documents solely as they relate to the Acquired Assets.

3.3 Assumed Liabilities. At the Closing, except as provided in Section 3.2 and/or in Section 3.4 hereof, and subject to Section 3.6, Purchaser shall assume, and agree to pay, perform, fulfill and discharge only the following Liabilities of Sellers (and only the following Liabilities) (collectively, the "Assumed Liabilities");

(a) all Liabilities and obligations of any Seller under the Assigned Contracts, including by making available the Closing Cure Amount (to the extent necessary, from the Working Capital Financing) at Closing in connection with the assumption and assignment of the Assigned Contracts, but excluding (i) trade payables arising on or after the Filing Date that are overdue for payment as of Closing, and (ii) any other Liabilities related to or arising out of a breach, non-monetary default, violation or non-compliance by any Seller or any Affiliate thereof prior to the Closing;

(b) all trade payables arising on or after the Filing Date for which the permitted payment period has not yet expired as of the Closing in the ordinary course and which the Sellers have not yet paid but has reserved for in the Budget;

(c) the Liabilities with respect to Transferred Employees under the terms of Assumed Plans to the extent arising following the Closing;

(d) all payroll liabilities with respect to Transferred Employees for the payroll period which includes the Closing Date;

(e) any and all Liabilities relating to Claims, Actions, suits, arbitrations, litigation matters, proceedings, investigations or other Actions (in each case, whether involving private parties, Governmental Bodies, or otherwise) arising from the operation of the Business as it relates to the Ekati Diamond Mine and the Acquired Assets from and after the Closing but excluding, for the avoidance of doubt, any such Liabilities (i) arising in the CCAA Proceedings

unrelated to the go-forward operations of the Business as it relates to the Ekati Diamond Mine, (ii) insured under insurance policies that are not transferable to Purchaser; (iii) with respect to Excluded Contracts or any other Excluded Assets, (iv) to Employees or former Employees who are not Transferred Employees, or (v) expressly excluded pursuant to Section 3.4;

(f) solely with respect to the Acquired Assets, and subject to such agreements and arrangements as Purchaser may enter into in satisfaction of the Sureties Support Confirmations, or otherwise in connection with the transactions contemplated hereby, any and all Environmental Liabilities and Obligations;

(g) all intercompany Indebtedness among Sellers and the Acquired Subsidiaries;

(h) all Liabilities under Authorizations included in the Acquired Assets, in each case solely in respect of the period commencing at the Closing Date and not related to any matter, circumstance or default existing at, prior to or as a consequence of Closing, subject to such agreements and arrangements as Purchaser may enter into in connection with the Sureties Support Confirmations; and

(i) all Liabilities with respect to letters of credit issued pursuant to the Pre-filing Credit Agreement with respect to Ekati Diamond Mine, subject to such Liabilities being assumed in the manner contemplated by the First Lien Lender MSA.

3.4 Excluded Liabilities. Notwithstanding anything in this Agreement to the contrary, the Purchaser is not assuming, and shall not be obligated to pay, perform or otherwise discharge any Liability that is not an Assumed Liability (collectively, the "Excluded Liabilities"), including the following:

(a) any and all Liabilities arising out of, relating to or otherwise in respect of the Acquired Assets and/or Business arising prior to the Closing, other than the Assumed Liabilities;

(b) any and all Liabilities of any Seller relating to or otherwise arising, whether before, on or after the Closing, out of, or in connection with, any of the Excluded Assets;

(c) any and all Liabilities of the Retained Subsidiaries;

(d) any and all Liabilities of any Seller for Indebtedness, including (i) all Liabilities with respect to the Pre-filing Credit Agreement (other than pursuant to the Pre-filing Indebtedness Assumption), the Pre-filing Indenture and the Interim Facility, (ii) all intercompany Indebtedness between any Seller, on the one hand, and the Retained Subsidiaries, on the other hand, and (iii) all Guarantees by Sellers, but excluding any intercompany Indebtedness among Sellers and the Acquired Subsidiaries;

(e) except as set forth in Section 13.14(a), any and all (i) Liabilities of any Seller for any Taxes (including, without limitation, Taxes payable by reason of contract, assumption, transferee or successor Liability, operation of Law, pursuant to section 160 of the Tax Act, Treasury Regulation section 1.1502-6 (or any similar provision of any other Law) or otherwise and any Taxes owed by any Seller and arising in connection with the consummation



of the transactions contemplated by this Agreement) arising or related to any period(s) on or prior to the Closing Date, and (ii) Taxes arising from or in connection with an Excluded Asset;

(f) any and all Liabilities of any Seller in respect of the Excluded Contracts and any other Contracts to which such Seller is party or is otherwise bound that are not Assigned Contracts;

(g) any and all Liabilities of any Seller in respect of the Diavik Joint Venture Agreement, the Diavik Joint Venture, the Diavik Joint Venture Interest, the Diavik Diamond Mine and the Diavik Realization Assets;

(h) all Liabilities and obligations of any Seller under the Assigned Contracts in respect of (i) a breach, non-monetary default, violation or non-compliance by any Seller or any Affiliate thereof prior to the Closing, and (ii) trade payables arising on or after the Filing Date that are overdue for payment as of Closing;

(i) any and all Liabilities arising out of or relating to any business or property formerly owned or operated by any Seller, any Affiliate or predecessor thereof, but not owned and operated by such Seller immediately prior to Closing;

(j) any and all Liabilities of any Seller or its predecessors arising out of any Contract, Authorization, franchise or claim that is not transferred to Purchaser as part of the Acquired Assets;

(k) any and all Liability for: (i) costs and expenses incurred by Sellers or owed in connection with the administration of the CCAA Proceedings (including the Monitor's fees, the fees and expenses of attorneys, accountants, financial advisors, consultants and other professionals retained by Sellers or the Monitor, and the fees and expenses of the post-filing lenders or the pre-filing lenders incurred or owed in connection with the administration of the CCAA Proceedings); (ii) all costs and expenses of Sellers incurred in connection with the negotiation, execution and consummation of the transactions contemplated under this Agreement; and (iii) all other Sellers' legal, financial, advisory, consulting or similar costs and expenses incurred or arising prior to the Closing;

(l) any and all Liabilities in respect of Employees other than the Liabilities relating to Transferred Employees that are expressly assumed under Section 3.3;

(m) any and all Liabilities with respect to change of control, severance, termination or similar arrangements with any officer, employee or contractor of any Seller;

(n) any and all Liabilities arising out of, relating to or otherwise in respect of any violation of Law by, or any Action against, any Seller or any breach, default or violation by any Seller of or under any Assigned Contracts occurring prior to the Closing;

(o) any and all Liabilities of Sellers under this Agreement;

(p) any and all Liabilities to any broker, finder or financial advisor for Sellers in connection with the transactions contemplated by this Agreement or otherwise;

(q) any and all Liabilities for any Tax or Taxes arising out of or relating to the operation of the Business (as currently or formerly conducted) or the ownership of the



Acquired Assets for any Pre-Closing Tax Period, including any and all property Taxes with respect to any Pre-Closing Tax Period;

(r) any Liability for any Tax or Taxes of Sellers or their Affiliates (other than the Acquired Subsidiaries) for any taxable period; and

(s) any Liability for any withholding Tax or Taxes imposed as a result of the transactions contemplated by this Agreement.

3.5 Conveyance and Consideration. Further to Section 3.1 and Section 3.3, above, (i) the Acquired Assets shall be conveyed to Purchaser from Sellers in consideration of the Purchase Price, which shall be allocated to the Acquired Assets in accordance with Section 13.14(e).

3.6 Assigned Contracts/Previously Omitted Contracts.

(a) Assignment and Assumption at Closing.

(i) Schedule A sets forth, to the Sellers' Knowledge, (A) a list of all Contracts to which any Seller is party, including all Contracts that, to the Sellers' Knowledge, were entered into by a Seller following the Filing Date and, (B) with respect to each Contract listed therein, Sellers' good-faith estimate of the Cure Amount if such Contract were an Assigned Contract. The "Assigned Contracts" shall be the Essential Contracts and Other Contracts designated on such Schedule A.

(ii) From and after the date hereof until the date that is five (5) Business Days prior to the date upon which the motion for the granting of the Assignment Order is scheduled to be heard by the CCAA Court, Bidders shall be entitled to make additions, deletions and modifications to the Contracts classified as an "Essential Contract," "Other Contract" or "Excluded Contract" on Schedule A in their sole discretion following consultation with Sellers by delivery of written notice to Sellers. For greater certainty, (A) any Contract designated by Bidders as an Excluded Contract on Schedule A after the date of this Agreement shall be deemed to no longer be an Assigned Contract and to be an Excluded Contract, (B) any Contract designated by Bidders as an Essential Contract on Schedule A after the date of this Agreement shall be deemed an Essential Contract for the purposes of this Agreement, and (C) any Contract designated by Bidders as an Other Contract on Schedule A after the date of this Agreement shall be deemed an Other Contract for the purposes of this Agreement.

(iii) Sellers shall use commercially reasonable efforts to obtain all consents required to assign the Assigned Contracts to the Purchaser. The Bidder Parties may request, in their reasonable commercial judgment, certain modifications and amendments to any Contract as a condition to such Contract becoming an Assigned Contract, and Sellers shall cooperate with all reasonable requests of the Bidder Parties to seek to obtain such modifications or amendments or to assist the Bidder Parties in obtaining such modifications or amendments; provided that Purchaser shall make available the Cure Funding Amount to satisfy the Cure Amount. If the Bidder Parties and Sellers are unable to obtain such modifications or amendments, the Bidder Parties may, in their sole discretion following consultation with Sellers, designate any Contract as an Excluded Contract. For the avoidance of doubt, the failure to obtain modifications or

amendments to an Essential Contract requested by the Bidder Parties shall not result in a failure to satisfy the condition to closing set out in Section 9.7.

(iv) To the extent that any Assigned Contract is not assignable without the consent of the counterparty or any other Person and such consent has not been obtained prior to the Closing Date, (A) the Sellers' rights, benefits and interests in, to and under such Assigned Contract may be conveyed to the Purchaser pursuant to an Assignment Order, (B) the Sellers will use commercially reasonable efforts to obtain an Assignment Order in respect of such Assigned Contract on or prior to the Closing Date, and (C) if an Assignment Order is obtained in respect of such Assigned Contract, the Purchaser shall accept the assignment of such Assigned Contract on such terms.

(v) Unless the Parties otherwise agree, to the extent that any Cure Amount is payable with respect to any Assigned Contract, Sellers shall (A) where such Assigned Contract is assigned pursuant to an Assignment Order, pay such Cure Amount in accordance with such Assignment Order, including paying the Closing Cure Amount at Closing, and (B) where such Assigned Contract is not assigned pursuant to an Assignment Order, pay such Cure Amount in the manner set out in the consent of the applicable counterparty or as otherwise may be agreed to by the Purchaser and such counterparty, including paying the Closing Cure Amount at Closing.

(b) Previously Omitted Contracts.

(i) If prior to Closing, (A) it is discovered that a Contract should have been listed but was not listed on Schedule A, or (B) a Contract is entered into after the Effective Date that would have been listed on Schedule A if any Seller had entered into such Contract on or before the Effective Date (any such Contract, a "Previously Omitted Contract"), Sellers shall, promptly following the discovery thereof or entry into such Contract (but in no event later than five (5) Business Days thereafter), notify the Bidder Parties in writing of such Previously Omitted Contract and any Cure Amount for such Previously Omitted Contract. The Bidder Parties shall thereafter deliver written notice to Sellers, promptly following notification of such Previously Omitted Contract from Sellers and in any event prior to the date that is five (5) Business Days prior to the date upon which the motion for the granting of the Assignment Order is scheduled to be heard by the CCAA Court, designating such Previously Omitted Contract as an "Essential Contract", "Other Contract" or "Excluded Contract" (a "Previously Omitted Contract Designation"). A Previously Omitted Contract designated in accordance with this Section 3.6 as an "Excluded Contract" or with respect to which the Bidder Parties fail to timely deliver a Previously Omitted Contract Designation, shall be an Excluded Contract.

(ii) If the Bidder Parties designate a Previously Omitted Contract as an "Essential Contract" or "Other Contract" in accordance with Section 3.6, Schedule A shall be amended to include such Previously Omitted Contract and Sellers shall serve a notice (the "Previously Omitted Contract Notice") on the counterparties to such Previously Omitted Contract notifying such counterparties of the Cure Amount with respect to such Previously Omitted Contract and Sellers' intention to assign such Previously Omitted Contract in accordance with this Section 3.6. The Previously Omitted Contract Notice shall provide the counterparties to such Previously Omitted Contract with seven (7) days to object, in writing to Sellers and the Bidder Parties, to the Cure Amount or the assumption of its Contract. If the counterparties, Sellers and the Bidder Parties are unable to reach a consensual resolution with respect to an objection relating

to a Previously Omitted Contract that has been designated as an "Essential Contract" in accordance with Section 3.6, Sellers will seek an expedited hearing before the CCAA Court for an Assignment Order in respect of such Essential Contract.

(c) Disclaimer of Assigned Contracts. Sellers shall not disclaim or seek to disclaim any Assigned Contract in the CCAA Proceedings or any other proceeding following the Effective Date and prior to any termination of this Agreement without the prior written consent of the Bidder Parties, which the Bidder Parties may withhold, condition or delay, in their sole discretion. For greater certainty, (i) all Contracts that have not been designated as "Assigned Contracts" as at the date that is five (5) Business Days prior to the date upon which the motion for the granting of the Assignment Order is scheduled to be heard by the CCAA Court shall be deemed to be Excluded Contracts, and (ii) the Sellers shall be entitled, at any time from and after the date that is five (5) Business Days prior to the date upon which the motion for the granting of the Assignment Order is scheduled to be heard by the CCAA Court, to disclaim or seek to disclaim any Excluded Contracts.

3.7 Assets Held by the Retained Subsidiaries. If it is determined at any time before or after the Closing that the Retained Subsidiaries hold any right, title or interest in or to any assets or properties that are used or useful in connection with the Business or that would otherwise constitute Acquired Assets if held by any Seller, then Sellers shall, and shall cause the Retained Subsidiaries to transfer and assign such assets to Purchaser or to one or more Designated Purchasers, as directed by Purchaser, subject to the terms of this Agreement. Without limiting the foregoing, Sellers shall cause the Retained Subsidiaries to transfer and assign to Purchaser or to one or more Designated Purchasers, as directed by Purchaser, all rights, options, Claims or causes of action of the Retained Subsidiaries against any party arising out of events occurring prior to the Closing, to the extent permitted under applicable Law. All assets, properties, rights, options, Claims or causes of action transferred to Purchaser or a Designated Purchaser pursuant to this Section 3.7 shall constitute Acquired Assets for the purposes of this Agreement.

#### **ARTICLE IV** **PURCHASE PRICE AND PAYMENT**

4.1 Purchase Price. The purchase price for the Acquired Assets shall be the aggregate  
of:

- (a) the amount of the Pre-filing Indebtedness Assumption;
- (b) the amount of the Indemnity Assumption; and
- (c) the amount of the Assumed Liabilities,

(the aggregate of the foregoing being collectively referred to herein as the "Purchase Price")

4.2 Satisfaction of Purchase Price. The Purchase Price shall be paid and satisfied by the Purchaser as follows:

(a) the assumption by Purchaser on Closing (or, at Purchaser's option and if permitted under the First Lien Lender MSA, the repayment on Closing) of US\$70,000,000 of outstanding Indebtedness under the Pre-filing Credit Agreement, on and subject to the terms and conditions set out in the First Lien Lender MSA and the definitive documents to be delivered pursuant thereto (the "Pre-filing Indebtedness Assumption");

(b) the assumption by Purchaser on Closing of indemnity and related obligations in respect of certain bonds in the face amount of \$278,970,785 Canadian dollars issued by the Sureties for the benefit of the Sellers, on and subject to the terms and conditions set out in the Sureties Support Confirmations and the definitive documents to be delivered pursuant thereto (the "Indemnity Assumption");

(c) The cash payment on Closing of the Closing Cure Amount (to be paid, to the extent necessary, from the Working Capital Financing) and the assumption by the Purchaser of the obligation to pay the balance of the Cure Funding Amount;

(d) the assumption by Purchaser on Closing of the Assumed Liabilities (other than any amounts addressed in Section 4.2(a) through Section 4.2(c)), by execution and delivery of the Assignment and Assumption Agreement.

4.3 Additional Consideration/Capitalization. At Closing, the Bidders shall provide to and make available to the Purchaser new financing (the "Working Capital Financing") of US\$70,000,000 to fund Purchaser's post-Closing satisfaction of Assumed Liabilities, operations at the Ekati Diamond Mine and general working capital, all on and subject to the terms and conditions set out in the First Lien Lender MSA and the definitive documents to be delivered pursuant thereto.

4.4 Further Assurances. From time to time after the Closing and without further consideration, (a) Sellers, upon the request of Purchaser, shall use commercially reasonable efforts to execute and deliver such documents and instruments of conveyance and transfer as Purchaser may reasonably request in order to consummate more effectively the purchase and sale of the Acquired Assets as contemplated hereby and to vest in Purchaser title to the Acquired Assets transferred hereunder, and (b) Purchaser, upon the request of Sellers, shall use commercially reasonable efforts to execute and deliver such documents and instruments of assumption as Sellers may reasonably request in order to confirm Purchaser's Liability for the obligations under the Assumed Liabilities or otherwise more fully consummate the transactions contemplated by this Agreement.

## **ARTICLE V**

### **REPRESENTATIONS AND WARRANTIES OF SELLERS**

Except as set forth in the Seller Disclosure Letter, Sellers represent and warrant to the Bidder Parties as of the Effective Date and the Closing Date, as follows:

5.1 Organization and Power. Each Seller is duly formed and validly existing under its jurisdiction of formation and is validly existing in good standing thereunder. Subject to the CCAA and the Amended and Restated Initial Order, each Seller has full power and authority to own, use and lease its properties and to conduct its Business as such properties are owned, used or leased and as such Business is currently conducted. Each Seller has previously delivered to the Bidder Parties true, complete and correct copies of its Organizational Documents, as amended and in effect on the Effective Date. Each Seller is duly qualified to do

business and is in good standing in each jurisdiction where the character of the Business or the nature of its properties makes such qualification or licensing necessary, except for such failures to be so qualified or licensed or in good standing as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

5.2 Authority; No Violation. Subject to the issuance of the Sale Order, each Seller has all requisite power and authority to enter into this Agreement and to carry out the transactions contemplated hereby, and the execution, delivery and performance of this Agreement by each Seller shall be duly and validly authorized and approved by all necessary company action. Subject to the issuance of the Sale Order (and assuming the due authorization, execution and delivery by the other Parties hereto), this Agreement shall constitute the legal and binding obligation of each Seller, enforceable against each Seller in accordance with its terms, except that equitable remedies and injunctive and other forms of equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceeding may be brought.

5.3 Consents.

(a) Except as set forth on Section 5.3(a) of the Seller Disclosure Letter, the execution, delivery and performance by Sellers of this Agreement or any Ancillary Document to which it is a party and the consummation of the transactions contemplated hereby or thereby in accordance with the Sale Order do not and will not (with or without notice or the passage of time):

(i) contravene, violate or conflict with any term or provision of Sellers' Organizational Documents;

(ii) violate any material Law applicable to any Seller or any Acquired Subsidiary or by which any property or asset of any Seller or any Acquired Subsidiary is bound; or (iii) result in any breach of, constitute a default (or an event that, with notice or lapse of time or both, would become a default) under, create in any party thereto the right to terminate or cancel, or require any consent under, or result in the creation or imposition of any Encumbrance (other than a Permitted Encumbrance) on any property or asset of any Seller or any Acquired Subsidiary under any Authorization or Material Contract, except in each case described in this clause (iii) to the extent that any such breach, default, right or requirement arises out of the commencement of the CCAA Proceedings or would be cured and the applicable Authorization or Material Contract would be assignable upon payment of the applicable Closing Cure Amount hereunder.

(b) Except (i) for the issuance of the Sale Order, (ii) for compliance as may be required with the Competition Act or other applicable Antitrust Laws, and (iii) as set forth on Section 5.3(a) of the Seller Disclosure Letter, no filing with, notice to or consent from any Person is required in connection with the execution, delivery and performance by Sellers of this Agreement or the Ancillary Documents to which it is a party and the consummation of the transactions contemplated hereby or thereby, other than such filings, notices or consents, the failure of which to make or obtain would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Assets, the Assumed Liabilities or the Business (other than in relation to the Diavik Joint Venture Interest), in each case taken as a whole.

5.4 Subsidiaries.

(a) Except as would not, individually or in the aggregate, have a Material Adverse Effect, each Acquired Subsidiary is duly incorporated, organized or formed and validly existing under the laws of its jurisdiction of incorporation, organization or formation, and has the requisite power and capacity to own, lease, license and operate its assets and properties and conduct its business as now conducted and is duly registered to carry on business and is in good standing in each jurisdiction in which the character of its assets and properties, owned, leased, licensed or operated by it, or the nature of its activities, make such registration necessary.

(b) Section 5.4(b) of the Seller Disclosure Letter sets out, with respect to each Subsidiary of Sellers as of the date hereof: (A) its name; (B) the percentage owned directly or indirectly by any Seller and the percentage owned by registered holders of capital stock or other equity interests if other than Sellers and their Subsidiaries; and (C) its jurisdiction of incorporation, organization or formation.

(c) Dominion Holdings or DDM is, directly or indirectly, the registered and beneficial owner of all of the outstanding common shares or other equity interests as reflected as being owned by Dominion Holdings or DDM, as applicable, in Section 5.4(b) of the Seller Disclosure Letter, directly or indirectly, of each of its Subsidiaries, free and clear of any Encumbrance, other than Permitted Encumbrances, all such shares or other equity interests so owned by Sellers have been validly issued and are fully paid and non-assessable, as the case may be, and no such shares or other equity interests have been issued in violation of any pre-emptive or similar rights. Except for the shares or other equity interests owned by Dominion Holdings or DDM, directly or indirectly, in any Subsidiary, and except as set forth in Section 5.4(b) of the Seller Disclosure Letter neither any Seller nor any Subsidiary owns, beneficially or of record, any equity interests of any kind in any other Person as of the date hereof.

(d) No Acquired Subsidiary has any Indebtedness, other than with respect to the intercompany Indebtedness owed solely to Sellers or other Acquired Subsidiaries (and for the avoidance of doubt, trade payables incurred in the Ordinary Course of Business) and no Acquired Subsidiary has provided any Guarantee.

#### 5.5 Title and Sufficiency of Assets.

(a) Sellers have good and valid title to (or with respect to leased property included in the Acquired Assets, valid leasehold interests in) the Acquired Assets, free and clear of all Encumbrances other than Permitted Encumbrances.

(b) The Acquired Subsidiaries have good and valid title to (or with respect to leased property included in the Acquired Assets, valid leasehold interests in) all assets and property which any such Acquired Subsidiary purports to own, free and clear of all Encumbrances other than Permitted Encumbrances, and there is no agreement, option or other right or privilege outstanding in favor of any Person for the purchase of any material asset from any Acquired Subsidiary outside the Ordinary Course of Business.

(c) The Acquired Assets, together with the assets and properties held by the Acquired Subsidiaries, include all of the properties and assets required to operate the Business (other than in relation to the Diavik Joint Venture Interest) in the Ordinary Course of Business.



(d) To the Knowledge of Sellers, neither Parent nor the Retained Subsidiaries hold any right, title or interest in or to any assets or properties that are used or useful in connection with the Business or that would otherwise constitute Acquired Assets if held by any Seller.

5.6 Financial Statements. Sellers have delivered to the Bidder Parties Parent's audited consolidated financial statements as at and for the fiscal year ended December 31, 2019 and unaudited consolidated financial statements as at March 31, 2020 and for the three months ended March 31, 2020 and 2019 (including, in each case, any of the notes or schedules thereto, any report thereon and related management's discussion and analysis), each of which: (i) were prepared in accordance with IFRS; and (ii) present fairly, in all material respects, the assets, liabilities and financial condition of Parent and its Subsidiaries on a consolidated basis as at the respective dates thereof and the revenues, earnings, results of operations, changes in shareholders' equity and cash flow of Parent and its Subsidiaries on a consolidated basis for the periods covered thereby (except as may be indicated in the notes to such financial statements and subject in the case of unaudited financial statements to normal, year-end audit adjustments). Except as set forth in such financial statements, neither any Seller nor any Acquired Subsidiary is party to any off-balance sheet transaction with unconsolidated Persons.

5.7 Compliance with Laws. Sellers and each of the Acquired Subsidiaries are, and since February 1, 2018 have been, in compliance with Law in all material respects. Neither any Seller nor any Acquired Subsidiary is, to the Knowledge of Sellers, under any material investigation with respect to, or has been charged or threatened to be charged with, or has received notice of, any material violation or potential material violation of any Law from any Governmental Body.

5.8 Authorizations. Except as would not, individually or in the aggregate, have a Material Adverse Effect, (i) each Seller and each Acquired Subsidiary owns, possesses or has obtained all Authorizations that are required by Law (including, for greater certainty, Environmental Law) to be owned, possessed or obtained by Sellers or any of the Acquired Subsidiaries in connection with the operation of the Business (other than in relation to the Diavik Joint Venture Interest) or in connection with the ownership, operation or use of the Acquired Assets; (ii) Sellers and the Acquired Subsidiaries, as applicable, lawfully hold, own or use, and have complied with all such Authorizations; (iii) each such Authorization is valid and in full force and effect, and is renewable by its terms or in the Ordinary Course of Business; and (iv) no action, investigation or proceeding is pending, or to the Knowledge of Sellers, threatened, against any Seller or any Acquired Subsidiary in respect of or regarding any such Authorization that could reasonably be expected to result in the suspension, loss or revocation of any such Authorization.

5.9 Material Contracts. Section 5.9 of the Seller Disclosure Letter sets out a complete and accurate list of all Material Contracts in effect or pursuant to which any Seller or any Acquired Subsidiary has surviving obligations as of the date hereof. True and complete copies of the Material Contracts have been disclosed in the Data Room and, other than as set out in the Data Room, no such Material Contract has been modified in any material respect. Each Material Contract is a legal, valid and binding agreement of the applicable Seller or the applicable Acquired Subsidiary, and is in full force and effect. Except as disclosed in Section 5.9 of the Seller Disclosure Letter and other than monetary defaults or such breaches arising out of the commencement of the CCAA Proceedings, neither any Seller nor any Acquired Subsidiary or, to the Knowledge of Seller, any other parties thereto, is in material breach or violation of or in default under (in each case, with or without notice or lapse of time or both) any

Material Contract and no Seller or any Acquired Subsidiary has received or given any notice of any material breach or default under any Material Contract which remains uncured, and there exists no state of facts which after notice or lapse of time or both would constitute a material breach of or default under any Material Contract by any Seller or any Acquired Subsidiary or, to the Knowledge of Sellers, any other party thereto.

5.10 Intentionally Deleted.

5.11 Ekati Mine.

(a) DDM owns each of the Ekati Buffer Zone and the Ekati Core Zone Joint Venture Interest free and clear of any Encumbrance other than Permitted Encumbrances. Except as specified in the Ekati Core Zone Joint Venture Agreement, as applicable, no Person has any Contract, or any right or privilege capable of becoming such, for the purchase from DDM of any of its interest in the Ekati Buffer Zone or the Ekati Core Zone Joint Venture. Except as specified in the Ekati Core Zone Joint Venture Agreement, as applicable, there are no back-in rights, earn-in rights, rights of first refusal, pre-emptive rights or similar provisions or rights which affect DDM's interest in the Ekati Buffer Zone, the Ekati Core Zone or the Ekati Core Zone Joint Venture.

(b) A copy of the Ekati Core Zone Joint Venture Agreement as currently in effect as of the date hereof has been made available to the Bidder Parties in the Data Room.

5.12 Leased Property. With respect to the real property leased or subleased by any Seller or any Acquired Subsidiary: (i) each lease or sublease for such property constitutes a legal, valid and binding obligation of the applicable Seller or the applicable Acquired Subsidiary, as the case may be, enforceable against such Seller or such Acquired Subsidiary, as the case may be, in accordance with its terms and is in full force and effect; (ii) except as disclosed in Section 5.12 (ii) of the Seller Disclosure Letter, neither any Seller nor any Acquired Subsidiary, as the case may be, is in breach of or default under any such lease or sublease and no event has occurred which, without the giving of notice or lapse of time, or both, would constitute a breach of or default under any such lease or sublease; and (iii) except as disclosed in Section 5.12 (iii) of the Seller Disclosure Letter, to the Knowledge of Sellers, no counterparty to any such lease or sublease is in default thereunder. Each Seller and each Acquired Subsidiary, as applicable, has good and valid leasehold title to the leased premises demised by such lease or sublease, free and clear of all Encumbrances, except for Permitted Encumbrances. Except as disclosed in Section 5.12 of the Seller Disclosure Letter, no third-party consent is required to be obtained by the Seller or the Acquired Subsidiary, nor is any notice required to be given by the Seller or the Acquired Subsidiary under any such lease or sublease in connection with the completion of the transactions contemplated herein. Except as disclosed in Section 5.12 of the Seller Disclosure Letter, neither the Seller nor any Acquired Subsidiary is a party to any written or oral subleases, licences or other contracts granting any Person the right to use, occupy, possess, lease or enjoy any leased premises nor has the Seller or any Acquired Subsidiary collaterally assigned or granted any other security interest in any of the leased premises or any interest therein.

5.13 Interests in Properties and Mineral Rights.

(a) The Diavik Leases, the Ekati Buffer Zone Leases and the Ekati Core Zone Leases comprise all of Sellers' and the Acquired Subsidiaries' material real properties and all of Sellers' and the Acquired Subsidiaries' material mineral interests and rights, in each case,



either existing under contract, by operation of Law or otherwise (collectively, and where material, the “Mineral Rights”). Neither Sellers nor the Acquired Subsidiaries own or have any interest in any other material real property or any other material mineral interests and rights.

(b) Other than pursuant to the Joint Venture Agreements, no Person has any interest in the Mineral Rights or any right to acquire any such interest, and no Person has any back-in rights, earn-in rights, rights of first refusal, pre-emptive rights or similar provisions or rights which would affect, in any material respect, DDM or, to the Knowledge of Sellers, DDMI’s interest in any of the Mineral Rights.

5.14 Litigation. Except as disclosed in Section 5.14 of the Seller Disclosure Letter, as of the date hereof, there are no claims, actions, suits, arbitrations, inquiries, investigations or proceedings pending, or, to the Knowledge of Sellers, threatened, against any Seller, any Acquired Subsidiary or, to the Knowledge of Sellers, DDMI, by or before any Governmental Body that, if determined adverse to the interests of any Seller, any Acquired Subsidiary or DDMI, would, individually or in the aggregate, have a Material Adverse Effect, or would be reasonably expected to prevent or materially delay the consummation of the transactions contemplated hereby, and no Seller or Acquired Subsidiary or, to the Knowledge of Sellers, DDMI or any of the Mine Properties is subject to any outstanding judgment, order, writ, injunction or decree that would reasonably be expected to have a Material Adverse Effect.

5.15 Environmental Matters. Except as would not, individually or in the aggregate, have a Material Adverse Effect, to the Knowledge of Sellers, (i) there exists no fact, condition or occurrence concerning any Seller, any Acquired Subsidiary, DDMI or the operation of the Business or Acquired Assets (including the Joint Ventures or the Mine Properties) with respect to any non-compliance with or obligation or liability under Environmental Laws; (ii) no unresolved complaint, notice or violation, citation, summons or order has been issued to any Seller or any Acquired Subsidiary or any of the Joint Ventures or the applicable manager/operator, as the case may be, alleging any violation by or liability of any Seller or any Acquired Subsidiary or any businesses or assets thereof, including the Joint Ventures or the Mine Properties, with respect to any Environmental Law; and (iii) the operation of the Business, including the Joint Ventures and the Mine Properties, is in compliance with Environmental Laws.

5.16 Aboriginal Claims.

(a) Section 5.16 of the Seller Disclosure Letter (to the Knowledge of Sellers, in respect of matters relating to the Diavik Joint Venture) contains a list of the current impact benefit or participation agreements, memoranda of understanding or similar arrangements (the “Aboriginal Agreements”) with all Aboriginal Groups with whom any Seller, any Acquired Subsidiary or any of the Joint Ventures has any such dealings and any written notices of an Aboriginal Claim received by any Seller or any Acquired Subsidiary where there is no current Aboriginal Agreement in place with the Aboriginal Group, in each case, as of the date hereof. Copies of the Aboriginal Agreements as in effect as of the date hereof have been made available in the Data Room. Other than as disclosed in the Seller Disclosure Letter (including the Aboriginal Agreements), as of the date hereof, to the Knowledge of Sellers, neither Sellers, any of the Acquired Subsidiaries, the Ekati Buffer Zone, the Ekati Core Zone Joint Venture, nor any of the Diavik Joint Venture or its manager, as the case may be, has received any written notice of an Aboriginal Claim which materially affects Sellers, any of the Acquired Subsidiaries, the Business, the Acquired Assets, the Joint Ventures or the Mine Properties.

(b) The Sellers have not received written notice of any material Claims from any Aboriginal Group with respect to Sellers, any Acquired Subsidiary, the Business, the Acquired Assets, the Joint Ventures or the Mine Properties.

(c) The Sellers have materially complied with all material obligations under the Aboriginal Agreements.

#### 5.17 Employees.

(a) All material written contracts in relation to Employees (calculated based on annual base salary plus target cash bonus) have been made available in the Data Room.

(b) The independent contractors of Sellers and the Acquired Subsidiaries are not entitled to any severance or similar payments upon termination of their Contracts that would be material and each of such Contracts can be terminated with no more than 60 days' advance notice.

(c) Other than as disclosed in Section 5.17 of the Seller Disclosure Letter, no Employee has any agreement as to length of notice or severance payment required to terminate his or her employment or is entitled to notice or severance payments other than such as results by Law, nor are there any change of control payments or severance payments or agreements with Employees providing for cash or other compensation or benefits upon the consummation of, or relating to, the transactions contemplated by this Agreement other than the key employee retention plan approved by the CCAA Court in the Amended and Restated Initial Order.

5.18 Collective Agreements. Section 5.18 of the Seller Disclosure Letter sets forth a list of all Collective Agreements as of the date hereof. Except as disclosed in Section 5.18 of the Seller Disclosure Letter (A) there are no collective bargaining or union agreements or employee association agreements or other binding commitments in force with respect to Employees, (B) no Person holds bargaining rights with respect to any Employees and (C) to the Knowledge of Sellers, no Person has applied to be certified as the bargaining agent of any Employees.

#### 5.19 Employee Plans.

(a) Section 5.19(a) of the Seller Disclosure Letter lists all written Employee Plans in effect as of the date hereof. Sellers have made available in the Data Room true, complete and up to date copies of all such material Employee Plans, as amended, together with all related documentation, including all material regulatory filings (including actuarial valuations) required to be filed with a Governmental Body and correspondence with Governmental Bodies with respect to such material regulatory filings (including actuarial valuations) of any Pension Plan (as defined in Section 5.19(a) of the Sellers Disclosure Letter).

(b) Sellers and the Acquired Subsidiaries have made all contributions and paid all premiums in respect of each material Employee Plan in a timely fashion in accordance with Law and in accordance with the terms of the applicable Employee Plan and all Collective Agreements. Except as would not, individually or in the aggregate, have a Material Adverse Effect, all financial liabilities of Sellers and the Acquired Subsidiaries (whether accrued, absolute, contingent or otherwise) related to all Employee Plans have been fully and accurately

disclosed in accordance with IAS 19 Employee Benefits in the financial statements referred to in Section 5.6 as of the dates of such financial statements.

(c) None of the Employee Plans (other than pension, retirement savings or retirement income plans) provide for retiree benefits or for benefits to retired or terminated Employees or to the beneficiaries or dependents of retired or terminated Employees.

(d) The execution of this Agreement and the completion of the transactions contemplated will not (either alone or in conjunction with any additional or subsequent events) constitute an event under any Employee Plan that will or may result in any payment (whether of severance pay or otherwise), acceleration of payment or vesting of benefits, forgiveness of Indebtedness, vesting, distribution, restriction on funds, increase in benefits or obligation to fund benefits with respect to any Employee or former Employee or their beneficiaries.

#### 5.20 Taxes.

(a) Each of the Sellers and the Acquired Subsidiaries has duly and timely filed all material Tax Returns and such Tax Returns are true, complete and correct in all material respects.

(b) Each of the Sellers and the Acquired Subsidiaries has paid all Taxes, including all installments on account thereof, that are due and payable by it.

(c) Each Seller: (i) is not a non-resident of Canada for purposes of section 116 of the Tax Act; or (ii) is not disposing of Acquired Assets which are considered to be "taxable Canadian property" of the Seller for purposes of section 116 of the Tax Act.

(d) Each of the Sellers and the Acquired Subsidiaries has withheld or collected all amounts required to be withheld or collected by it on account of Taxes and has remitted all such amounts to the appropriate Governmental Body when required by Law to do so.

(e) The Canadian Assets include all or substantially all of each Seller's "Canadian resource property" for the purposes of sections 66 and 66.7 of the Tax Act.

(f) Each of DDM, DDCU and Dominion Marketing is registered for purposes of the GST Legislation. Each of DDM, DDCU and Dominion Marketing's GST registration numbers are set out in Section 5.20(f) of the Seller Disclosure Letter.

(g) The Purchaser Acquired Interests are "financial instruments" for the purposes of the GST Legislation.

(h) DDC is, and at all times has been, classified as an entity disregarded from its owner for U.S. federal tax purposes.

5.21 Brokers and Finders. Other than the Sale Advisor, no Person has acted, directly or indirectly, as a broker, finder or financial advisor for Sellers in connection with the transactions contemplated by this Agreement and the Bidder Parties are not and will not become obligated to pay any fee or commission or like payment to any broker, finder or

financial advisor as a result of the consummation of the transactions contemplated by this Agreement based upon any arrangement made by or on behalf of Sellers or their Subsidiaries.

5.22 No Other Representations or Warranties. Except for the representations, warranties and covenants of Sellers expressly contained herein or any certificate delivered hereunder, neither Sellers nor any of their respective Representatives, nor any other Person, makes any other express or implied warranty (including, without limitation, any implied warranty of merchantability or fitness for a particular purpose) on behalf of Sellers, including, without limitation, as to (a) the probable success or profitability of ownership, use or operation of the Acquired Assets by Purchaser after the Closing, (b) the probable success or results in connection with the CCAA Court and the Sale Order, or (c) the value, use or condition of the Acquired Assets, which are being conveyed hereby on an “As-Is”, “Where-Is” condition at the Closing Date, without any warranty whatsoever (including, without limitation, any implied warranty of merchantability or fitness for a particular purpose).

## **ARTICLE VI**

### **REPRESENTATIONS AND WARRANTIES OF THE BIDDERS**

Each Bidder hereby represents and warrants, on a several and not joint basis, to Sellers as of the Effective Date as follows:

6.1 Organization and Power. Such Bidder Party is duly formed and validly existing under its jurisdiction of formation and is validly existing in good standing thereunder. Such Bidder has full power and authority to own, use or lease its properties and to conduct its business as such properties are owned, used or leased and as such business is currently conducted.

6.2 Purchaser's Authority; No Violation. Such Bidder has all requisite power and authority to enter into this Agreement and to carry out the transactions contemplated hereby, and the execution, delivery and performance of this Agreement by such Bidder shall be duly and validly authorized and approved by all necessary company action. This Agreement shall constitute the legal and binding obligation of such Bidder, enforceable against such Bidder in accordance with its terms, except that the enforceability hereof may be subject to bankruptcy, insolvency, reorganization, moratorium or other similar Laws now or hereafter in effect relating to creditors' rights generally and that equitable remedies and injunctive and other forms of equitable relief may be subject to equitable defenses and to the discretion of the court before which any proceeding may be brought. Subject to the issuance of the Sale Order and subject to compliance with the applicable requirements of the Competition Act, the entering into of this Agreement, and the consummation by such Bidder of the transactions contemplated hereby will not (a) violate the provisions of any applicable federal, state or local Laws or (b) violate any provision of such Bidder's Organizational Documents, violate any provision of, or result in a default or acceleration of any obligation under, or result in any change in the rights or obligations of such Bidder under, any Encumbrance, contract, agreement, license, lease, instrument, indenture, Order, arbitration award, judgment, or decree to which such Bidder is a party or by which it is bound, or to which any property of such Bidder is subject.

6.3 Consents, Approvals or Authorizations. Except for compliance as may be required by the Competition Act or other applicable Antitrust Laws, no consent, waiver, approval, Order or Authorization of, or registration, qualification, designation or filing with any Person or Governmental Body is required in connection with the execution, delivery and performance by such Bidder of this Agreement or the Ancillary Documents to which such Bidder

is a party, the compliance by such Bidder with any of the provisions hereof or thereof, the consummation of the transactions contemplated hereby or thereby, the assumption and performance of the Assumed Liabilities by Purchaser or the taking by such Bidder of any other action contemplated hereby or thereby, other than such filings, notices or consents, the failure of which to make or obtain would not reasonably be expected to have, individually or in the aggregate, a material adverse effect on such Bidder's ability to perform its obligations under this Agreement and the Ancillary Documents to which such Bidder is a party, or to consummate the transactions contemplated hereby or thereby, including the assumption of the Assumed Liabilities by Purchaser.

6.4 Brokers. Other than the Bidder Advisor, no Person has acted, directly or indirectly, as a broker, finder or financial advisor for such Bidder in connection with the transactions contemplated by this Agreement that would obligate Sellers to pay any fee or commission or like payment to any broker, finder or financial advisor as a result of the consummation of the transactions contemplated by this Agreement based upon any arrangement made by or on behalf of such Bidder.

6.5 GST Registration. By or before the Closing Date, the Purchaser shall be registered for the purposes of the GST Legislation. This registration will have an effective date on or before the Closing Date.

6.6 "As Is, Where Is" Basis. Notwithstanding any other provision of this Agreement, each Bidder acknowledges, agrees and confirms that:

(a) except for the representations and warranties of the Sellers set forth in Article V, and subject to the other covenants and agreements set forth herein, such Bidder is entering into this Agreement and the Purchaser will acquire the Acquired Assets and assume the Assumed Liabilities on an "as is, where is" basis as they exist as at Closing and will accept the Acquired Assets in their state, condition and location as at Closing except as expressly set forth in this Agreement and the sale of the Acquired Assets is made without legal warranty and at the risk of the Purchaser;

(b) except for the representations and warranties of the Sellers set forth in Article V, neither the Sellers, the Sale Advisor, nor the Monitor or their Representatives have made or are making, and such Bidder is not relying on, any representations, warranties, statements or promises, express or implied, statutory or otherwise, concerning the Acquired Assets, the Sellers' right, title or interest in or to the Acquired Assets, the Business or the Assumed Liabilities, including with respect to merchantability, physical or financial condition, description, fitness for a particular purpose, suitability for development, title, description, use or zoning, environmental condition, existence of any parts/and/or components, latent defects, quality, quantity or any other thing affecting any of the Acquired Assets or the Assumed Liabilities, or normal operation thereof, or in respect of any other matter or thing whatsoever, including any and all conditions, warranties or representations expressed or implied pursuant to any applicable Law in any jurisdiction, which such Bidder confirms does not apply to this Agreement and are hereby waived in their entirety by such Bidder;

(c) except as otherwise expressly provided in this Agreement, such Bidder hereby unconditionally and irrevocably waives any and all actual or potential rights or Claims such Bidder might have against the Sellers, Monitor, Sale Advisor and their Representatives pursuant to any warranty, express or implied, legal or conventional, of any kind or type, other than those representations and warranties of the Sellers expressly set forth in

Article V. Such waiver is absolute, unlimited, and includes, but is not limited to, waiver of express warranties, implied warranties, warranties of fitness for a particular use, warranties of merchantability, warranties of occupancy, strict liability and Claims of every kind and type, including Claims regarding defects, whether or not discoverable or latent, product liability Claims, or similar Claims, and all other Claims that may be later created or conceived in strict liability or as strict liability type Claims and rights;

(d) none of the representations and warranties of the Sellers contained in this Agreement shall survive Closing and, subject to Section 12.1, the Bidders' sole recourse for any breach of representation or warranty of the Sellers in Article V shall be for the Bidders not to complete the transactions as contemplated by this Agreement pursuant to the rights set forth in Article XII and for greater certainty the Bidders shall have no recourse or claim of any kind against the Sellers or the proceeds of the transactions contemplated by this Agreement following Closing; and

(e) this Section 6.6 shall not merge on Closing and is deemed incorporated by reference in all Closing documents and deliveries.

6.7 Investment Canada Act. As of the Closing Date, the Purchaser shall be a trade agreement investor or a WTO investor for the purposes of the *Investment Canada Act*.

6.8 Financial Capability. The Bidders have and will have on the Closing Date access without condition to the requisite financial resources to, or to cause the Purchaser to, purchase the Acquired Assets, satisfy the Purchase Price, provide the Working Capital Financing and otherwise consummate the transactions contemplated hereby, subject to the terms and conditions set out herein. The performance of any obligation by the Bidders under this Agreement is not conditioned on any third party financing commitments or arrangements.

6.9 No Other Representations or Warranties. Except for the representations, warranties and covenants of the Bidders expressly contained herein or any certificate delivered hereunder, none of the Bidders nor any of their Representatives, nor any other Person, makes any other express or implied warranty (including, without limitation, any implied warranty of merchantability or fitness for a particular purpose) on behalf of the Bidders.

6.10 Joint and Several. Without limiting the generality of Section 13.4, the representations and warranties of each Bidder to Sellers under this Agreement are several, and not joint and not joint and several.

## **ARTICLE VII**

### **COVENANTS OF SELLERS AND/OR PURCHASER**

#### **7.1 Conduct of Business of Sellers.**

(a) During the Pre-Closing Period, except (x) as required by Law, (y) as expressly required or authorized by this Agreement, the Amended and Restated Initial Order or (z) as consented to in writing by the Bidders (such consent not to be unreasonably withheld, delayed or conditioned), Sellers shall, and shall cause their Subsidiaries to:

(i) take all actions reasonably necessary or appropriate in furtherance of re-starting operations at the Ekati Diamond Mine as soon as possible, and shall in any case ensure that such operations are re-started by no later than



January 29, 2021, all in accordance with the re-start plan shown to and approved by the Bidders including, without limitation, by procuring all necessary or desirable supplies, equipment, contractors and employees and taking such other actions as may be reasonably requested by the Bidders in furtherance of satisfying the requirements of this Section 7.1, provided, however, that the foregoing shall be subject to the terms of the First Lien Lender MSA;

(ii) use commercially reasonable efforts to (A) preserve intact its business organizations, (B) maintain the Business and the Acquired Assets (normal wear and tear excepted), (C) keep available the services of its officers and Employees, subject to continuation of all temporary employee layoffs in place as of the Effective Date except as may be otherwise required by Section 7.1(a)(i) of this Agreement, (D) minimize discretionary expenditures, and (E) maintain and preserve satisfactory relationships with Aboriginal Groups and Governmental Bodies;

(iii) from cash on hand, fund a designated bank account (which may be a bank account in the name of the Monitor) with a sufficient amount to cover the costs to facilitate the wind-down of the Sellers' estates including the administration of the Diavik Realization Assets both before and after the Closing, such amount not to exceed US\$250,000 (the "Wind-Down Account");

(iv) from cash on hand, fund a designated bank account (which may be a bank account in the name of the Monitor) with a sufficient amount to cover the costs to administer the Diavik Realization Assets both before and after the Closing, in the amount of US\$1,000,000 (the "Diavik Realization Account");

(v) immediately prior to Closing, pay in full, net of any retainers, all unpaid obligations secured by priority charges ordered by the Court in the CCAA Proceedings and all professional fees and expenses of the legal and financial advisors to the Sellers and the Monitor due and payable at Closing; and

(vi) immediately prior to Closing, pay in full all professional fees and expenses of the legal and financial advisors to the First Lien Lenders due and payable at Closing.

(b) Without limiting the generality of Section 7.1(a), during the Pre-Closing Period, except (x) as required by Law, (y) as expressly required or authorized by this Agreement or contemplated in the First Lien Lender MSA or (z) as consented to in writing by the Bidders (such consent not to be unreasonably withheld, delayed or conditioned), Sellers shall not:

(i) end any temporary employee layoff or similar arrangement that is in place as of the Effective Date, except as may be required under Section 7.1(a)(i), or terminate the employment of any employee of the Sellers;

(ii) sell, lease, exchange, transfer or otherwise dispose of, or agree to sell, lease, exchange, transfer or otherwise dispose of, any material Acquired Asset, other than the sale of Inventory in accordance with the Budget, with reasonable prior notice delivered to the Monitor and the Bidders;

(iii) settle or compromise any material litigation or claims relating to the Business or the Acquired Assets or that would impose any restrictions or Liabilities on the Business or Purchaser's use of the Acquired Assets after the Closing;

(iv) permit, allow or suffer any assets that would be Acquired Assets to be subjected to any Encumbrance other than Permitted Encumbrances and, if required, any DIP loan in the manner contemplated by the First Lien Lender MSA;

(v) cancel or compromise any material debt or claim that would be included in the Acquired Assets or waive or release any material right of Sellers that would be included in the Acquired Assets;

(vi) recognize any labor organization as a collective bargaining representative of any Persons employed by Sellers or their Subsidiaries, or enter into a collective bargaining agreement or employee association agreement with any labor organization affecting any such Persons;

(vii) grant any increase in the compensation or benefits of any employee or former employee or any dependent or other person claiming through an employee or former employee, including the grant, increase or acceleration in any severance, change in control, termination or similar compensation or benefits payable to any employee;

(viii) enter into any Material Contract or terminate, amend, restate, supplement, extend or waive (partially or completely) any rights under any Material Contract;

(ix) take any action that would reasonably be expected to prevent or significantly impede or materially delay the completion of the transactions contemplated hereunder;

(x) make, revoke or change any election relating to Taxes, file any amended Tax Return, request, enter into or obtain any Tax ruling with or from a Governmental Body, or execute or file, or agree to execute or file, with any Governmental Body any agreement or other document extending, or having the effect of extending, the period of assessment or collection of any Taxes, in each case, that may reasonably be expected to have any adverse effect on the Purchaser or any of its Affiliates, for any taxable period, or portion thereof, beginning after the Closing Date; or

(xi) agree in writing to do any of the foregoing.

## 7.2 Consents and Approvals.

(a) Sellers and the Bidders shall each use commercially reasonable efforts (i) to obtain all consents and approvals, as reasonably requested by the Bidder Parties and Sellers, to more effectively consummate the purchase and sale of the Acquired Assets and the assumption and assignment of the Assigned Contracts and Assumed Liabilities, as applicable, together with any other necessary consents and approvals to consummate the transactions contemplated hereby, including, if required, the *Competition Act* Approval and any other Mandatory Antitrust Approvals, (ii) to make, as reasonably requested by the Bidder Parties and Sellers, all filings, applications, statements and reports to all authorities which are



required to be made prior to the Closing Date by or on behalf of the Bidder Parties and/or Sellers or any of their respective Affiliates pursuant to any applicable Regulation in connection with this Agreement and the transactions contemplated hereby, (iii) to obtain, as reasonably requested by the Bidder Parties and Sellers, all required consents and approvals (if any) to assign and transfer the Authorizations to Purchaser at Closing and, to the extent that one or more of the Authorizations are not transferable, to obtain replacements therefor, and (iv) to satisfy the conditions precedent set out in Article IX and Article X by such dates as required to achieve the Closing on or prior to the Outside Date.

(b) In furtherance and not in limitation of the foregoing, each of Sellers and the Bidder Parties shall prepare and file: (i) within 10 Business Days after the date of the Sale Order or on such other timetable as may be agreed to by the Parties, all filings required and desirable to obtain *Competition Act* Approval and, to the extent required, including pre-merger notification filings in accordance with Part IX of the *Competition Act*, (ii) as soon as reasonably practicable after the date of this Agreement, all filings required and desirable to obtain any other Mandatory Antitrust Approvals, and (iii) all other necessary documents, registrations, statements, petitions, filings and applications for other Antitrust Approvals and any other consent or approval of any other Governmental Body required to satisfy the conditions set forth in Section 9.2 and Section 10.2.

(c) Subject to the provisions of Section 4.4 and this Section 7.2, in the event that certain Authorizations are not transferable or replacements therefor are not obtainable on or before the Closing, but such Authorizations are transferable or replacements therefor are obtainable after the Closing, the Bidder Parties and Sellers shall continue to use such reasonable efforts in cooperation with the other after the Closing as may be required to obtain all required consents and approvals to transfer, or obtain replacements for, such Authorizations after Closing and shall do all things reasonably necessary to give Purchaser the benefits which would be obtained under such Authorizations; provided, however, that Sellers' obligations under this Section 7.2(c) shall not restrict Sellers from making any distributions in or terminating the CCAA Proceedings or otherwise winding up their respective affairs or cancelling their existence upon the completion of any such winding up.

(d) Sellers and the Bidder Parties shall use commercially reasonable efforts to (i) cooperate with each other in connection with any filing or submission and in connection with any investigation or other inquiry, including any proceeding initiated by a private party; (ii) keep the other Parties informed in all material respects of any material communication received by such Party from, or given by such Party to, any Governmental Body and of any material communication received or given in connection with any proceeding by a private party, in each case regarding any of the transactions contemplated hereby, including providing to the other Parties copies of all such material communications given or received; (iii) provide to the other Party reasonable opportunity to comment on drafts of filings and submissions prior to submitting same to a Governmental Body; and (iv) consult with each other in advance of any meeting or conference (whether in person or by telephone) with any Governmental Body, including in connection with any proceeding by a private party, and provide the other Party an opportunity to participate with at least one attendee in any meetings of a substantive nature with a Governmental Body. The foregoing obligations in this Section 7.2(d) shall be subject to any attorney-client, solicitor-client, work product, or other privilege, and each of the Parties hereto shall coordinate and cooperate fully with the other Parties hereto in exchanging such information and providing such assistance as such other Parties may reasonably request in connection with the foregoing.

(e) If, (i) notwithstanding the applicable provisions of the CCAA, the Sale Order, the Assignment Order (if applicable) and the commercially reasonable efforts of Sellers, any consent to the assignment of an Assigned Contract is not obtained prior to Closing and as a result thereof the Purchaser shall be prevented by a third party from receiving the rights and benefits with respect to an Acquired Asset intended to be transferred hereunder, (ii) any attempted assignment of an Acquired Asset would adversely affect the rights of Sellers thereunder so that the Purchaser would not in fact receive all of the rights and benefits contemplated or (iii) any Acquired Asset is not otherwise capable of sale and/or assignment (after giving effect to the Sale Order, the Assignment Order and the CCAA), then, in each case, Sellers shall, subject to any approval of the CCAA Court that may be required, at the request of the Bidders and subject to Section 4.4, cooperate with the Bidders in any lawful and commercially reasonable arrangement under which the Purchaser would, to the extent practicable, obtain the economic claims, rights and benefits under such asset and assume the economic burdens and obligations with respect thereto in accordance with this Agreement, including by subcontracting, sublicensing or subleasing to the Purchaser.

(f) Notwithstanding any other provision of this Agreement, the Bidders shall control and lead all communications and strategy relating to the *Competition Act* Approval and any other Mandatory Antitrust Approvals, and the final determination as to any appropriate courses of action shall be made by the Bidders.

7.3 Confidentiality. The Bidders and the Sellers acknowledge that the confidential information provided to them in connection with this Agreement, including under Section 7.5, and the consummation of the transactions contemplated hereby, is subject to the Confidentiality Agreements dated June 8, 2020 between each of the Bidders and DDM (the "Confidentiality Agreement"). Sellers agree that except as may otherwise be required in connection with the CCAA Proceedings or by Law, they will treat any confidential information provided to or retained by them in accordance with this Agreement as if they were the receiving party under the Confidentiality Agreement and Sellers agree that for purposes of Sellers' confidentiality obligation hereunder, the term contained in the fourteenth paragraph of the Confidentiality Agreement shall be deemed to be three (3) years from the Closing Date. The Parties agree that the provisions regarding confidentiality contained in the Confidentiality Agreement shall survive the termination of this Agreement and the Confidentiality Agreement in accordance with the terms set forth therein but shall terminate upon the Closing as to the Bidder Parties and their Representatives (as defined therein).

7.4 Change of Name. Promptly following the Closing, Sellers shall, and shall cause their respective direct and indirect Subsidiaries to, discontinue the use of the "Dominion Diamonds" name (and any other trade names or "d/b/a" names currently utilized by Sellers or their respective direct or indirect Subsidiaries) and shall not subsequently change its name to or otherwise use or employ any name which includes the words "Dominion Diamond Mines" or any other similar name or mark confusingly similar thereto without the prior written consent of Purchaser, and Sellers shall, if requested by the Purchaser, make an application to the CCAA Court requesting the name of Sellers in the title of the CCAA Proceedings to be changed; provided, however, that Sellers and their respective Subsidiaries may continue to use their current names (and any other names or d/b/a's currently utilized by Sellers or their respective Subsidiaries) included on any business cards, stationery and other similar materials following the Closing for a period of up to seventy-five (75) days solely for purposes of winding down the affairs of Sellers; provided that when utilizing such materials, other than in incidental respects, Sellers and each of their respective direct and indirect Subsidiaries shall use commercially

reasonable efforts to indicate its new name and reference its current name (and any other trade names or "d/b/a" names currently utilized by each).

7.5 Bidder Parties' Access to Sellers' Records. The Sellers' shall provide the Bidder Parties (or their designated Representatives) reasonable access, upon reasonable advance notice to Sellers, to Sellers' Employees, books and records, corporate offices and other facilities for the purpose of conducting such additional due diligence as the Bidder Parties deem appropriate or necessary in order to facilitate the Bidder Parties' efforts to consummate the transaction provided for herein. Sellers hereby covenant and agree to reasonably cooperate with the Bidder Parties in this regard.

7.6 Notification of Certain Matters.

(a) As promptly as reasonably practicable, Sellers shall give notice to the Bidder Parties of (i) any notice or other communication from any Person alleging that the consent of such Person, which is or may be required in connection with the transactions contemplated by this Agreement or the Ancillary Documents, is not likely to be obtained prior to Closing, (ii) any written objection or proceeding that challenges the transactions contemplated hereby or to the issuance of the Sale Order, and (iii) the status of matters relating to the completion of the transactions contemplated hereby, including promptly furnishing the other with copies of notices or other communications received by Sellers or by any of their respective Affiliates (as the case may be), from any third party and/or any Governmental Body with respect to the transactions contemplated by this Agreement other than communications which are confidential, without prejudice or privileged by their nature.

(b) Each Party hereto shall promptly notify the other party in writing of any fact, change, condition, circumstance or occurrence or nonoccurrence of any event that would or would reasonably be expected to (i) constitute a breach or inaccuracy of any of the representations and warranties of such Party had such representation or warranty been made at the time of the occurrence or nonoccurrence of such event, (ii) constitute a breach of any covenant of such Party, or (iii) make the satisfaction of any condition to Closing impossible or unlikely to be satisfied; provided that no such notice shall be deemed to amend or modify the representations and warranties made hereunder or the Seller Disclosure Letter for purposes of Section 9.4, Section 10.4 or otherwise, or limit the remedies available to any Party hereunder.

7.7 Preservation of Records. Sellers (or any subsequently appointed bankruptcy estate representative, including, but not limited to, a trustee, a creditor trustee or a plan administrator) agree and the Purchaser shall agree that each of them shall preserve and keep the books and records held by it relating to the pre-Closing Business for a period commencing on the Effective Date and ending at such date on which an orderly wind-down of Sellers' operations has occurred in the reasonable judgment of the Bidder Parties and Sellers and shall make such books and records available to the other Parties (and permit such other Party to make extracts and copies of such books and records at its own expense) as may be reasonably required by such Party in connection with, among other things, facilitating the continuing administration of the CCAA Proceedings, any insurance Claims by, legal proceedings or Tax audits against or governmental investigations of Sellers or the Bidder Parties or in order to enable Sellers or the Bidder Parties to comply with their respective obligations under this Agreement and each other agreement, document or instrument contemplated hereby or thereby. In the event that Sellers, on the one hand, or the Bidder Parties, on the other hand, wish to destroy such records during the foregoing period, such Party shall first give twenty (20) days' prior written notice to the other and such other Party shall have the right at its option and

expense, upon prior written notice given to such Party within that twenty (20) day period, to take possession of the records within thirty (30) days after the date of such notice.

7.8 Publicity. Neither Sellers nor the Bidder Parties shall issue any press release or public announcement concerning this Agreement or the transactions contemplated hereby without obtaining the prior written approval of the other Party hereto, which approval will not be unreasonably withheld or delayed, unless, in the reasonable judgment of the Bidder Parties or Sellers, disclosure is otherwise required by such party by applicable Law or by the CCAA Court with respect to filings to be made with the CCAA Court in connection with this Agreement; provided that the Party intending to make such release shall use commercially reasonable efforts consistent with such applicable Law or the CCAA Court requirement to consult with the other Party with respect to the text thereof.

7.9 Material Adverse Effect. Sellers shall promptly inform the Bidder Parties in writing of the occurrence of any event that has had, or is reasonably expected to have, a Material Adverse Effect or otherwise cause the failure of any of the Bidder Parties' conditions to Closing set forth in Article IX.

7.10 Sale Free and Clear; No Successor Liability. On the Closing Date, the Acquired Assets shall be transferred to the Purchaser free and clear of all obligations, Liabilities and Encumbrances (other than Permitted Encumbrances) to the fullest extent permitted by the CCAA.

7.11 Casualty Loss. If, before the Closing, all or any portion of the Acquired Assets is (a) condemned or taken by eminent domain, or (b) is damaged or destroyed by fire, flood or other casualty, Sellers shall promptly notify the Bidder Parties promptly in writing of such fact, (i) in the case of condemnation or taking, Sellers shall promptly assign or pay, as the case may be, any proceeds thereof to Purchaser at the Closing, and (ii) in the case of fire, flood or other casualty, Sellers shall promptly assign the insurance proceeds therefrom to Purchaser at Closing. Notwithstanding the foregoing, the provisions of this Section 7.11 shall not in any way modify the Bidder Parties' other rights under this Agreement, including any applicable right to terminate the Agreement if any condemnation, taking, damage or other destruction resulted in a Material Adverse Effect or otherwise cause the failure of any of the Bidder Parties' conditions to Closing set forth in Article IX.

7.12 Debtors-in-Possession. From the commencement of the CCAA Proceedings through the Closing, Sellers shall continue to operate their business pursuant to and in accordance with the CCAA and Orders of the CCAA Court. Sellers shall not convert or seek to convert the CCAA Proceedings into any form of a liquidation proceeding under the CCAA or any other applicable legislation.

7.13 CCAA Court Filings.

(a) Sellers shall use their reasonable best efforts to cause the CCAA Court to issue the Sale Order on or prior to December 11, 2020.

(b) Sellers shall serve notices of assumption of the Assigned Contracts, including the designation of Cure Amounts, on all necessary parties on or prior to the date which is not less than five (5) Business Days prior to the date designated by the Bidders to appear before the CCAA Court to request the Assignment Order, or such other date as may be agreed to by the Parties.

(c) Sellers shall use their reasonable best efforts to cause the CCAA Court to issue the Assignment Order on or prior to such date as may be designated by the Bidders, acting reasonably.

(d) Sellers shall use their commercially reasonable efforts to provide the Bidder Parties for review reasonably in advance of filing drafts of such material motions, pleadings or other filings relating to the process of consummating the transactions contemplated by this Agreement to be filed with the CCAA Court, including the motions for issuance of the Sale Order and the Assignment Order (if applicable).

(e) In the event an appeal is taken or a stay pending appeal is requested from the Sale Order, Sellers shall promptly notify the Bidder Parties of such appeal or stay request and shall provide the Bidder Parties promptly a copy of the related notice of appeal or order of stay. Sellers shall also provide the Bidder Parties with written notice of any motion or application filed in connection with any appeal from such orders. Sellers agree to take all action as may be reasonable and appropriate to defend against such appeal or stay request and Sellers and the Bidder Parties agree to use their reasonable best efforts to obtain an expedited resolution of such appeal or stay request, provided that nothing herein shall preclude the Parties hereto from consummating the transactions contemplated hereby, if the Sale Order shall have been issued and has not been stayed and the Bidder Parties, in their sole discretion, waive in writing the condition that the Sale Order be a Final Order.

(f) Sellers and the Bidder Parties acknowledge that this Agreement and the sale of the Acquired Assets and the assumption of the Assumed Liabilities are subject to approval by the CCAA Court.

(g) After issuance of the Sale Order, neither the Bidder Parties nor Sellers shall take any action which is intended to, or fail to take any action the intent of which failure to act is to, result in the reversal, voiding, modification or staying of the Sale Order.

7.14 Payment of Cure Amount. The Closing Cure Amount shall be paid in accordance with Section 4.2(c). Any Cure Amounts other than the Closing Cure Amount shall be paid by the Purchaser following Closing pursuant to the terms and conditions set out in settlement agreements entered into by the Sellers and which are in respect of or constitute the Assigned Contracts. Following the Closing, Purchaser shall provide to Sellers, if requested, evidence that the Closing Cure Amount, and subsequent payments of the Cure Amount (if any) in respect of each Assigned Contract has been paid by Purchaser in accordance with (i) the Assignment Order where such Assigned Contract is assigned pursuant to an Assignment Order, or (ii) the consent of the applicable counterparty or as otherwise agreed upon by Purchaser and such counterparty, where such Assigned Contract is not assigned pursuant to an Assignment Order, in each case promptly following such payment.

7.15 GNWT Royalties. Prior to or concurrent with the Closing, Sellers shall pay and/or otherwise obtain releases in full in a form satisfactory to the Bidder Parties of all obligations in respect of any period that are due and payable prior to Closing in respect of royalties or similar payment obligations to GNWT, which shall include (for the avoidance of any doubt) all royalty and similar payments obligations to GNWT in respect of fiscal year 2019.

7.16 Permitted Encumbrances/Assigned Contracts. For greater certainty, Purchaser shall not be required at Closing to assume any Encumbrance or agreement other than Permitted Encumbrances and Assigned Contracts. If the Sale Order designates any Permitted



Encumbrances that prior to Closing are determined to relate to agreements which are not Assigned Contracts, Sellers shall give prompt written notice thereof to the beneficiaries of such Encumbrances. Upon Sellers giving such written notice, which shall be given not less than 10 days prior to Closing, the effect of the Sale Order shall be to vest title in the Acquired Assets in Purchaser free and clear of all such Encumbrances at Closing without need for further order of the Court and notwithstanding their original inclusion in the Sale Order's list of Permitted Encumbrances.

## **ARTICLE VIII** **EMPLOYEE MATTERS**

### **8.1 Covenants of Sellers with respect to Employees.**

(a) Purchaser shall make employment offers to substantially all Employees of Sellers, subject to and consistent with requirements based on the plan for resumption of operations at Sellers' facilities, and in consultation with Sellers' management on terms and conditions that are substantially similar to those under which the Employees are employed at the time of Closing. Sellers shall provide reasonable assistance to facilitate the transfer of all Employees that Purchaser elects to hire, which may be subject to any temporary layoff or reduction in effect at Closing, including, without limitation, providing Purchaser access to such Employees' personnel records and such other information regarding the Employees as Purchaser may reasonably request, consistent with Section 8.2 hereof. All Employees who receive employment offers from Purchaser and who accept such offers of employment are hereinafter referred to as the "Transferred Employees". The Purchaser shall acknowledge that it is successor under all collective agreements set out in Section 5.18 of the Seller Disclosure Letter.

(b) During the Pre-Closing Period, except as consented to in writing by the Bidders (such consent not to be unreasonably withheld, delayed or conditioned), and without limiting the obligations and restrictions set forth in Section 7.1, Sellers (i) shall satisfy all pre-Closing legal or contractual requirements to provide notice to, or to enter into any consultation procedure with, any labor union or organization, which is representing any Employee, in connection with the transactions contemplated by this Agreement, and (ii) shall not (A) enter into, establish, adopt, materially amend or terminate any Employee Plan (or any plan or arrangement that would be an Employee Plan if in existence on the date of this Agreement), other than as required by Law, (B) increase the compensation and benefits payable or to become payable to Employees or former Employees or any dependent or other person claiming through an Employee or former Employee, (C) grant any extraordinary bonuses, benefits or other forms of directors' or consultants' compensation, (D) promote, hire or terminate the employment of (other than for cause) any Employee or (E) transfer the employment of any individual such that such individual becomes an Employee or transfer the employment of any Employee such that such individual no longer qualifies as an Employee.

### **8.2 Covenants of Purchaser with respect to Employees.**

(a) Purchaser shall assume the Employee Plans (collectively, the "Assumed Plans"). Purchaser, on the one hand, and Sellers, on the other, shall take such actions as are necessary and reasonably requested by any Party to cause Purchaser to assume sponsorship of and responsibility for administration and operation of such Employee Plans as of the Closing and to effect the transfer of all assets and benefit liabilities of the

Assumed Plans together with all related trust, insurance policies and administrative services agreements, effective as soon as practicable following the Closing.

(b) On and following the Effective Date, Sellers and the Bidder Parties shall reasonably cooperate in all matters reasonably necessary to effect the transactions contemplated by this Section 8.2, including exchanging information and data relating to workers' compensation, employee benefits and employee benefit plan coverage, and in obtaining any governmental approvals required hereunder, except as would result in the violation of any applicable Law, including without limitation, any Law relating to the safeguarding of data privacy.

(c) The provisions of this Section 8.2 are for the sole benefit of the Parties to this Agreement only and shall not be construed to grant any rights, as a third party beneficiary or otherwise, to any person who is not a Party to this Agreement, nor shall any provision of this Agreement except solely for the purpose of giving effect to Section 8.2(a) and Section 8.2(b) hereof be deemed to be the adoption of, or an amendment to, any Employee Plan, or otherwise to limit the right of Purchaser or Sellers to amend, modify or terminate any such Employee Plan. In addition, nothing contained herein shall be construed to (i) prohibit any amendments to or termination of any Employee Plan or (ii) prohibit the termination or change in terms of employment of any Employee (including any Transferred Employee) as permitted under applicable Law. Nothing herein, expressed or implied, shall confer upon any Employee (including any Transferred Employee) any rights or remedies (including, without limitation, any right to employment or continued employment for any specified period) of any nature or kind whatsoever, under or by reason of any provision of this Agreement.

## **ARTICLE IX**

### **CONDITIONS PRECEDENT TO OBLIGATIONS OF PURCHASER**

The obligations of the Purchaser, and of the Bidders to cause Purchaser, to consummate the Closing are subject to satisfaction (or, to the extent permitted by applicable Law, waiver by the Bidders) of the following conditions precedent on or before the Closing Date.

9.1 CCAA Court Approvals. The Sale Order and the Assignment Orders (if applicable) shall have been issued by the CCAA Court and shall have become a Final Order.

9.2 Antitrust Approvals. All Antitrust Approvals and other necessary regulatory approvals shall have been obtained.

9.3 No Court Orders. No court or other Governmental Body shall have issued, enacted, entered, promulgated or enforced any Law or Order that has not been vacated, withdrawn or overturned restraining, enjoining or otherwise prohibiting the transactions contemplated by this Agreement.

9.4 Representations and Warranties True as of Both Effective Date and Closing Date. Each of the representations and warranties of Sellers (a) contained herein (other than as set forth in clause (c) below) that are not qualified by "materiality" or "Material Adverse Effect" shall be true and correct in all material respects on and as of the Effective Date (except for such representations and warranties that specifically relate to an earlier date, which shall be true and correct in all material respects as of such earlier date) and on and as of the Closing Date with the same force and effect as though made on and as of the Closing Date, (b) contained herein (other than as set forth in clause (c) below) that are qualified by "materiality" or "Material

Adverse Effect” shall be true and correct in all respects on and as of the Effective Date (except for such representations and warranties that specifically relate to an earlier date, which shall be true and correct in all respects as of such earlier date) and on and as of the Closing Date with the same force and effect as though made on and as of the Closing Date, and (c) contained in Section 5.1, Section 5.2, Section 5.4 and Section 5.6 shall be true and correct in all respects on and as of the Effective Date (except for such representations and warranties that specifically relate to an earlier date, which shall be true and correct in all respects as of such earlier date) and on and as of the Closing Date with the same force and effect as though made on and as of the Closing Date.

9.5 Compliance with Covenants. Sellers shall have performed or complied in all material respects with all of their covenants and obligations hereunder which are required to be performed or complied with at or prior to Closing.

9.6 No Material Adverse Effect. Since the Effective Date, there shall not have been a Material Adverse Effect.

9.7 Essential Contracts; Cure Amount. (i) All consents, approvals or waivers necessary to assign the Essential Contracts to the Purchaser shall have been obtained, or an Assignment Order shall have been granted by the CCAA Court in respect of such Essential Contracts where necessary consents, approvals or waivers have not been obtained, provided for clarity that any consent in respect of the Aboriginal Agreements and related agreements shall be in form and substance satisfactory to the Bidder Parties; (ii) the Cure Amount shall not exceed the Cure Funding Amount (calculated based on an exchange rate of US\$1 to Cdn\$1.32 with respect to any amounts to be paid in Canadian dollars) and (iii) the Assignment Order shall provide that the Cure Amount with respect to Assigned Contracts subject to the Assignment Order shall not be payable earlier than 30 days following Closing.

9.8 Authorizations. Purchaser (or the applicable Designated Purchaser) shall have received (and there shall be in full force and effect), in each case in form and substance satisfactory to the Bidder Parties, either by transfer or re-issuance, all material Authorizations required to operate the Business and Acquired Assets, including the Environmental Agreement and Aboriginal Agreements and related agreements and those other Authorizations set forth (or required to be set forth) on Section 5.3(a) of the Seller Disclosure Letter, consistent in all material respects with historical operations.

9.9 Sureties Support Confirmations. The Sureties shall have taken all steps contemplated by the Sureties Support Confirmations.

9.10 Ordinary Course Operations. Purchaser shall not be subject to any mandatory governmental Regulations or restrictions related to COVID-19 which would prevent or materially restrict: (i) Purchaser from taking actions and conducting operations at the Ekati Diamond Mine substantially consistent with the re-start plan shown to and approved by Bidders; or (ii) Purchaser's ability to transport, sort and conduct diamond sales in a quantum substantially consistent with past practices prior to COVID-related impacts.

9.11 Delivery of Acquired Assets. Each of the deliveries required to be made to Purchaser pursuant to Section 11.2 shall have been so delivered and, at Closing, Sellers shall deliver possession of all Acquired Assets to Purchaser, *in situ*, wherever such Acquired Assets are located at Closing consistent with the terms of this Agreement.



9.12 Corporate Documents. Sellers shall have delivered to Purchaser copies of the resolutions of Sellers' board of directors or similar governing body, as applicable, evidencing the approval of this Agreement and the transactions contemplated hereby.

9.13 Release of Encumbrances. The Sale Order shall provide for the release of any and all Encumbrances on the Acquired Assets other than Permitted Encumbrances, and Purchaser shall have received such documents or instruments as may be required, in Purchaser's reasonable discretion, to demonstrate that, effective as of the Closing Date, the assets of the Acquired Subsidiaries are released from any and all Encumbrances other than Permitted Encumbrances.

9.14 Accounts Payable. Sellers shall have paid all trade payables arising from the provision of goods and services on or after the Filing Date for which the permitted payment period has not yet expired as of Closing, other than such amounts which are disputed by the Sellers in good faith for which adequate reserves have been created under the Budget.

9.15 First Lien Lender MSA Documents. The First Lien Lenders shall have executed and delivered the definitive documentation, in form and content satisfactory to the First Lien Lenders and the Bidder Parties, acting reasonably, regarding the transactions between such parties contemplated by the First Lien Lender MSA.

## **ARTICLE X**

### **CONDITIONS PRECEDENT TO OBLIGATIONS OF SELLERS**

The obligations of Sellers to consummate the Closing are subject to satisfaction (or, to the extent permitted by applicable Law, waiver by Sellers) of the following conditions precedent on or before the Closing Date:

10.1 CCAA Court Approvals. The Sale Order shall have been issued by the CCAA Court and shall have become Final Orders.

10.2 Antitrust Approvals. All Antitrust Approvals shall have been obtained.

10.3 No Court Orders. No court or other Governmental Body shall have issued, enacted, entered, promulgated or enforced any Law or Order that has not been vacated, withdrawn or overturned restraining, enjoining or otherwise prohibiting the transactions contemplated by this Agreement.

10.4 Representations and Warranties True as of Both Effective Date and Closing Date. The representations and warranties of the Bidder Parties (a) contained herein that are not qualified by "materiality" or "material adverse effect" shall be true and correct in all material respects on and as of the Effective Date, and shall also be true in all material respects on and as of the Closing Date (except for representations and warranties which specifically relate to an earlier date, which shall be true and correct in all material respects as of such earlier date) with the same force and effect as though made by the Bidder Parties on and as of the Closing Date, and (b) contained herein that are qualified by "materiality" or "material adverse effect" shall be true and correct in all respects on and as of the Effective Date, and on and as of the Closing Date with the same force and effect as though made on and as of the Closing Date (except for representations and warranties which specifically relate to an earlier date, which shall be true and correct in all material respects as of such earlier date), in each case, except where the failure of such representations and warranties to be so true and correct has not had, and would

not reasonably be expected to have, individually or in the aggregate, a material adverse effect on the Bidder Parties' ability to consummate the transactions contemplated by this Agreement.

10.5 Compliance with Covenants. The Bidders shall have performed or complied in all material respects with all of their covenants and obligations hereunder which are required to be performed or complied with at or prior to Closing.

10.6 Corporate Documents. Purchaser shall have delivered to Sellers copies of the resolutions of Purchaser's board of directors or other governing body evidencing the approval of this Agreement and the transactions contemplated hereby.

## **ARTICLE XI**

### **CLOSING**

11.1 Closing. Unless otherwise mutually agreed by the Parties, the closing of the purchase and sale of the Acquired Assets, the payment of the Purchase Price, the assumption of the Assumed Liabilities and the consummation of the other transactions contemplated by this Agreement (the "Closing") shall take place on the fifth (5th) Business Day following full satisfaction or due waiver (by the Party entitled to the benefit of such condition) of the closing conditions set forth in Article IX and Article X (other than conditions that by their terms or nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of those conditions at the Closing), or at such other place and time as the Parties may agree.

11.2 Deliveries by Sellers. At or prior to the Closing, Sellers shall deliver, in addition to the other documents contemplated by this Agreement, the following to Purchaser:

(a) a bill of sale in form and content satisfactory to Sellers and Bidders, acting reasonably, duly executed by Sellers;

(b) an assignment and assumption agreement in form and content satisfactory to Sellers and Bidders, acting reasonably (the "Assignment and Assumption Agreement"), duly executed by Sellers;

(c) duly executed instruments for the sale, transfer, assignment or other conveyance to Purchaser or relevant Designated Purchasers, of the equity interests in the Acquired Subsidiaries, in accordance with the requirements of applicable local Law and this Agreement;

(d) a true copy of the Sale Order and any Assignment Orders (if applicable);

(e) an officer's certificate, dated as of the Closing Date, executed by a duly authorized officer of each Seller certifying that the conditions set forth in Section 9.4 and Section 9.5 have been satisfied;

(f) an instrument of assumption and assignment of the Assigned Contracts regarding leased real property in form and content satisfactory to Sellers and Bidders, acting reasonably (the "Assignment and Assumption of Leases"), duly executed by each Seller, in form for recordation with the appropriate public land records to the extent the underlying lease is of record;

(g) an Intellectual Property Assignment and Assumption Agreement in form and content satisfactory to Sellers and Bidders, acting reasonably (the "IP Assignment and Assumption Agreement"), duly executed by each Seller;

(h) possession of all owned real property included in the Acquired Assets, together with duly executed and acknowledged transfer deeds for all such owned real property conveying the owned real property subject only to Permitted Encumbrances, and any existing surveys, legal descriptions and title policies that are in the possession of Sellers;

(i) possession of the Acquired Assets and the Business in situ, wherever such Acquired Assets are located at the Closing consistent with the terms of this Agreement;

(j) stock powers or similar instruments of transfer, duly executed by the applicable Seller, transferring all of the capital stock or other equity interests of the Acquired Subsidiaries to Purchaser (it being understood that such instruments shall address the requirements under applicable Law local to the jurisdiction of organization of each such Acquired Subsidiary necessary to effect and make enforceable the transfer to Purchaser of the legal and beneficial title to such capital stock or other equity interests);

(k) all tax elections or designations described in Section 13.14;

(l) a certificate duly executed by each Seller, in the form prescribed under Treasury Regulation section 1.1445-2(c);

(m) a bill of sale and assignment agreement with respect to the conveyance of any Acquired Assets required to be transferred and assigned to Purchaser pursuant to Section 3.7, in form and substance reasonably satisfactory to Purchaser, duly executed by Parent and the Retained Subsidiaries; and

(n) such other bills of sale, deeds, endorsements, assignments and other good and sufficient instruments of conveyance and transfer, in form and substance reasonably satisfactory to the Bidder Parties, as the Bidder Parties may reasonably request to vest in Purchaser all of Sellers' right, title and interest in, to or under any or all the Acquired Assets, including all owned real property included in the Acquired Assets.

11.3 Deliveries by Purchaser. At the Closing, Purchaser will deliver the following:

(a) the Assignment and Assumption Agreement duly executed by the Purchaser;

(b) the Assignment and Assumption of Leases duly executed by the Purchaser;

(c) the IP Assignment and Assumption Agreement, executed by the Purchaser;

(d) all tax elections or designations described in Section 13.14, duly executed by Purchaser;

(e) an officer's certificate, dated as of the Closing Date, executed by a duly authorized officer of the Purchaser certifying that the conditions set forth in Section 10.4 and Section 10.5 have been satisfied; and

(f) definitive documentation executed by the Bidders to provide the Working Capital Financing;

(g) to the extent necessary and from the Working Capital Facility, the portion of the Cure Funding Amount required to satisfy the Closing Cure Amount;

(h) such other documents as Sellers may reasonably request that are not inconsistent with the terms of this Agreement and customary for a transaction of this nature and necessary to evidence or consummate the transactions contemplated by this Agreement.

11.4 Monitor's Certificate. Upon satisfaction or waiver by the Purchaser of all conditions precedent to Closing under Article IX and delivery to the Purchaser of all Closing deliverables under Section 11.2, the Purchaser shall deliver to the Monitor a certificate, dated as of the Closing Date, confirming the satisfaction or waiver of such conditions precedent and delivery of such Closing deliverables (the "Purchaser's Conditions Certificate"). Upon satisfaction or waiver by the Sellers of all conditions precedent to Closing under Article X and delivery to the Sellers of all Closing deliverables under Section 11.3, the Sellers shall deliver to the Monitor a certificate, dated as of the Closing Date, confirming the satisfaction or waiver of such conditions precedent and delivery of such Closing deliverables (the "Sellers' Conditions Certificate") and together with the Purchaser's Conditions Certificate, the "Conditions Certificates"). Upon receipt by the Monitor of each of the Conditions Certificates, the Monitor shall (i) forthwith issue its Monitor's Certificate concurrently to the Sellers and the Purchaser, at which time the Closing will be deemed to have occurred; and (ii) file as soon as practicable a copy of the Monitor's Certificate with the CCAA Court (and shall provide a true copy of such filed certificate to the Sellers and the Purchaser). For greater certainty, the Monitor shall be entitled to rely exclusively on the basis of the Conditions Certificates and without any obligation whatsoever to verify the satisfaction or waiver of the applicable conditions.

## **ARTICLE XII** **TERMINATION**

12.1 Termination of Agreement. This Agreement and the transactions contemplated hereby may be terminated at any time on or prior to the Closing Date:

(a) Mutual Consent. By mutual written consent of the Bidders and Sellers.

(b) Termination by the Bidder Parties or Sellers.

(i) by the Bidders or Sellers, if the Closing shall not have occurred on or prior to February 1, 2021 or such later date as may be designated by the Bidders (the "Outside Date"); provided that neither the Bidders nor the Sellers shall be entitled to terminate this Agreement pursuant to this Section 12.1(b)(i) if the failure of the Closing to have occurred by the date specified above is caused by such Party's breach of any of its obligations under this Agreement; provided, however, that either the Bidders or the Sellers may, on the day that is not less two (2) Business Days immediately prior to the then Outside Date, elect to extend the Outside Date by delivering a written notice to the

other Party stating that, if, on the Outside Date, the required approvals from any Governmental Body to transfer or reissue any material Authorization required to operate the Business and the Acquired Assets, including any of those set forth (or required to be set forth) on Section 5.3(a) of the Seller Disclosure Letter, has not been obtained, then the Outside Date shall extend by seven (7) days; provided, further, that there shall be no more than four of such seven (7) day extensions; or

(ii) by the Bidders or Sellers, if the CCAA Court or other court of competent jurisdiction or a governmental, quasi-governmental, regulatory or administrative department, agency, commission or authority shall have issued or enacted an Order or Law restraining, enjoining or otherwise prohibiting the Closing, which is not capable of appeal; provided, however, that Sellers and the Bidders shall not be entitled to terminate this Agreement pursuant to this Section 12.1(b)(ii) if such Order is caused by such Party's breach of any of its obligations under this Agreement.

(c) Termination by the Bidders.

(i) by the Bidders, if (A) the Sale Order shall not have been issued on or prior to December 11, 2020 or if the Sale Order has been issued by such date but has been amended, supplemented or otherwise modified in any respect without the prior written consent of the Bidders, or (B) following its issuance, the Sale Order shall fail to be in full force and effect or shall have been stayed, reversed, modified or amended in any respect without the prior written consent of the Bidders, acting reasonably;

(ii) by the Bidders, if the CCAA Proceedings are terminated or a licensed insolvency trustee or receiver is appointed in respect of the Sellers, and such licensed insolvency trustee or receiver refuses to proceed with the transactions contemplated by this Agreement;

(iii) by the Bidders, if a breach of any representation, warranty, covenant or agreement on the part of Sellers set forth in this Agreement shall have occurred that would cause any of the conditions set forth in Article IX not to be satisfied, and such breach is incapable of being cured or, if capable of being cured, Sellers have failed to cure such breach within thirty (30) days of receipt of written notification thereof or which by its nature or timing cannot be cured within such time period;

(iv) by the Bidders, if either (a) Sellers or their Affiliates request or (b) the CCAA Court approves any amendment or modification to the Amended and Restated Initial Order that adversely affects the interests of the Bidder Parties;

(v) by the Bidders, acting reasonably, if the CCAA Court enters any Order inconsistent with the Sale Order or the Acquisition (including, without limitation, any provisions of this Agreement), other than in any de minimis respect;

(vi) by the Bidders, if any creditor of any Seller obtains a final and unstayed Order of the CCAA Court granting relief from the stay to foreclose or exercise enforcement rights on any portion of the Acquired Assets in excess of Cdn\$500,000 in the aggregate; or

(vii) by the Bidders, if a Material Adverse Effect occurs.

(d) Termination by Sellers.

(i) by Sellers, if a breach of any representation, warranty, covenant or agreement on the part of Bidders set forth in this Agreement shall have occurred that would cause any of the conditions set forth in Article X not to be satisfied, and such breach is incapable of being cured or, if capable of being cured, Bidders have failed to cure such breach within thirty (30) days of receipt of written notification thereof or which by its nature or timing cannot be cured within such time period.

12.2 Procedure and Effect of Termination. If this Agreement is terminated pursuant to Section 12.1, written notice thereof shall forthwith be given to the other Parties to this Agreement and the Monitor and all further obligations of the Parties under this Agreement shall terminate; provided, however, that the Parties shall, in all events, remain bound by and continue to be subject to the provisions set forth in this Article XII.

12.3 Breach by Bidder. If this Agreement is terminated solely as a result of a material breach by any Bidder pursuant to Section 12.1(d) hereof, Sellers, as their sole remedy, shall be entitled to liquidated damages in the amount of US\$7,000,000 (the "Purchaser Termination Fee"), which shall be payable by the breaching Bidder or Bidders by wire transfer of immediately available funds. Liability for the Purchaser Termination Fee shall be several, and not joint, and shall be the sole responsibility of the breaching Bidder or Bidders. In the event that there is more than one breaching Bidder, liability for payment of the Purchaser Termination Fee shall be split among all breaching Bidders on a pro rata basis relative to their respective holdings of Second Lien Notes on the Effective Date and Sellers shall in no event be entitled to recover in the aggregate more than the amount of the Purchaser Termination Fee. The Parties hereby agree that the foregoing dollar amount of the Purchaser Termination Fee is a fair and reasonable estimate of the total detriment that Sellers would suffer in the event of any Bidder's default and failure to complete the transaction hereunder. Sellers' receipt of the Purchaser Termination Fee in full pursuant to and in accordance with this Section 12.3 shall be the sole and exclusive remedy of Sellers and their Affiliates, attorneys, accountants, Representatives or agents, and, except for payment of the Purchaser Termination Fee pursuant to and in accordance with this Section 12.3, in no event shall any of the foregoing Persons be entitled to seek or obtain any recovery or judgment against the Bidder Parties, any Bidder Related Party, any potential debt or equity financing source and any of their respective former, current or future general or limited partners, stockholders, members, managers, directors, officers, employees, agents, Representatives or Affiliates, for any Liability suffered with respect to this Agreement and the transactions contemplated by or in connection with this Agreement (including any breach or failure to perform by Bidder Parties, whether willfully, intentionally, unintentionally or otherwise), the termination of this Agreement, the failure of the transactions contemplated under this Agreement to be consummated for any reason or no reason or any breach of this Agreement by Bidders, and in no event shall Sellers or any of the other applicants be entitled to seek or obtain any other damages or other remedy of any kind, at law or in equity, against any such Person, including consequential, special, indirect, exemplary or punitive damages or for diminution in value, lost profits or lost business. Sellers further acknowledged that the Purchaser Termination Fee is not a penalty, but rather is liquidated damages in a reasonable amount that will appropriately compensate Sellers under the circumstances.

12.4 Break-up Fee



(a) In consideration of the Bidders having expended considerable time and expense in connection with this Agreement and the negotiation thereof, and the identification and quantification of assets to be included in the Acquired Assets, if: (i) this Agreement is terminated or the transaction contemplated herein is not completed for any reason other than the Bidders' non-compliance with their obligations under this Agreement; and (ii) an alternative transaction is consummated within nine (9) months of the date of this Agreement for the sale or restructuring of the Sellers or any material portion of their assets and pursuant to which Indebtedness under the Pre-filing Credit Agreement is repaid in full in cash ("Alternate Transaction"); then in such event (and in addition to such other amounts to which the Bidder Parties may be entitled pursuant to Section 13.1 hereof and otherwise) Sellers shall pay to Bidders immediately following the closing of such Alternate Transaction an amount equal to US\$2,522,140 (the "Break-Up Fee") as consideration for the disposition of Bidders' rights under this Agreement.

(b) Sellers' obligation to pay the Break-Up Fee pursuant to this Section 12.4 shall survive termination of this Agreement and shall be secured by a charge against all of the Sellers' properties and assets to be included in the Sale Order, which charge shall rank subsequent to: (i) other priority charges ordered by the Court in the CCAA Proceedings prior to the date of this Agreement; and (ii) charges in respect of Indebtedness under the Pre-filing Credit Agreement.

### **ARTICLE XIII** **MISCELLANEOUS**

13.1 Expenses. Sellers shall, immediately upon issuance of the Sale Order and from time to time thereafter, promptly pay and reimburse all costs and expenses incurred and to be incurred by Bidder Parties and the ad hoc group of holders of Second Lien Notes in the CCAA Proceedings in respect of this Agreement, the transactions contemplated hereby, and participation or representation in the CCAA Proceedings including, without limitation: (i) any and all professional fees and expenses of legal and financial advisors; and (ii) a maximum of US\$150,000 in respect of any and all fees or expense reimbursements or other amounts of any kind payable to actual or prospective sources of debt or equity financing incurred on or prior to the Effective Date. In addition to the foregoing, Sellers shall on Closing pay and reimburse all legal fees and expenses incurred by the trustee under the Pre-filing Indenture in respect of its participation or representation in the CCAA Proceedings up to an aggregate maximum amount satisfactory to the Bidders.

13.2 Survival of Representations and Warranties; Survival of Confidentiality. The Parties agree that the representations and warranties contained in this Agreement shall expire upon the Closing Date. Except as otherwise provided herein, the Parties agree that the covenants contained in this Agreement to be performed at or after the Closing shall survive in accordance with the terms of the particular covenant or until fully performed.

13.3 Amendment; Waiver. This Agreement may be amended, supplemented or changed, and any provision hereof may be waived, only by written instrument making specific reference to this Agreement signed by the Party against whom enforcement of any such amendment, supplement, modification or waiver is sought; provided that, notwithstanding the foregoing, the Acquired Assets and Assigned Contracts may be amended in accordance with Section 3.6. No action taken pursuant to this Agreement, including any investigation by or on behalf of any Party, shall be deemed to constitute a waiver by the Party taking such action of compliance with any representation, warranty, condition, covenant or agreement contained

herein. The waiver by any Party of a breach of any provision of this Agreement shall not operate or be construed as a further or continuing waiver of such breach or as a waiver of any other or subsequent breach. No failure on the part of any Party to exercise, and no delay in exercising, any right, power or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of such right, power or remedy by such Party preclude any other or further exercise thereof or the exercise of any other right, power or remedy. All remedies hereunder are cumulative and are not exclusive of any other remedies provided by applicable Law.

#### 13.4 Bidders.

(a) Any right given to, or election or decision to be made by, Bidders in this Agreement or any Ancillary Documents may be exercised by a majority in number of all Bidders who control, at the relevant time, a majority in principal amount of the aggregate Second Lien Notes held by all Bidders in their managed or advisory funds and accounts. Bidders agree to cooperate with each other reasonably and in good faith with respect to all matters relating to this Agreement and the transaction contemplated herein. The representations, warranties, covenants, agreements, obligations and commitments of Bidders to Sellers or any other Person under this Agreement or any Ancillary Document are several, and not joint. The Parties acknowledge and agree that Bidders and Purchaser are separate Persons and that any obligations, liabilities or commitments of Purchaser, under this Agreement or otherwise, are not obligations, liabilities or commitments of Bidders. Sellers acknowledge that Bidders are financial management and advisory companies and are entering into this Agreement on behalf of certain managed or advisory funds and accounts. No such managed or advisory funds and accounts shall under any circumstance whatsoever assume or incur any obligation, liability or commitment whatsoever to Sellers in respect of this Agreement, the Ancillary Documents or the transaction contemplated therein. Any obligation or commitment of Bidders herein to cause Purchaser to take any action or omit to take any action shall be limited to the commercially reasonable efforts of each such Bidder.

(b) (The Parties hereto acknowledge that all representations, warranties, covenants and other agreements made by any Bidder that is an investment manager on behalf of a separately managed account managed by such Bidder are being made only with respect to the assets managed by such Bidder on behalf of such separately managed account, and shall not apply to (or be deemed to be made in relation to) any assets or interests that may be beneficially owned by such separately managed account that are not held through accounts managed by such Bidder.

13.5 Notices. Any notice, request, instruction or other document to be given hereunder by a Party hereto shall be in writing and shall be deemed to have been given (i) when received if given in person, (ii) on the date of transmission if sent by electronic mail, or (iii) one (1) Business Day after being delivered to a nationally known commercial courier service providing next day delivery service (such as FedEx):

(A) If to Sellers, addressed as follows:

Dominion Diamond Mines  
900 – 606 4 Street SW  
Calgary, Alberta, Canada  
T2P 1T1



Attention: Brendan Bell  
Email: brenbellnt@gmail.com

With a copy (which shall not constitute notice) to:

Blake, Cassels & Graydon LLP  
595 Burrard Street, Suite 2600  
Vancouver, BC, Canada  
V7X 1L3  
Attention: Susan Tomaine  
Email: susan.tomaine@blakes.com

- (B) If to the Bidder Parties, to each Bidder Party, addressed as follows:

to DDJ:

DDJ Capital Management, LLC  
130 Turner Street  
Building 3, Suite 600  
Waltham, MA 02453  
Attention: Beth Duggan and Eric Hoff  
Email: legal@ddjcap.com

to Brigade:

Brigade Capital Management, LP  
399 Park Avenue, 16th Floor  
New York, NY 10022  
Attention: Andy Petitjean  
Attention: Chris Chaice  
Email: apetitjean@brigadecapital.com  
Email: cchaice@brigadecapital.com

With a copy (which shall not constitute notice) to

Torys LLP  
79 Wellington St. West, 30th Floor  
Toronto, Ontario, M5K1N2  
Attention: Tony DeMarinis  
Email: tdemarinis@torys.com

- (C) If to the Monitor, addressed as follows

FTI Consulting Canada Inc.  
520 5th Ave SW  
Calgary AB T2P 3R7  
Attention: Deryck Helkaa  
E-Mail: deryck.helkaa@fticonsulting.com

With a copy (which shall not constitute notice) to

Bennett Jones LLP  
4500 Bankers Hall East  
855 - 2nd Street SW  
Calgary AB T2P 4K7  
Attention: Chris Simard  
Email: simardc@bennettjones.com

or to such other individual or address as a Party hereto may designate for itself by notice given as herein provided.

13.6 Effect of Investigations. Any due diligence review, audit or other investigation or inquiry undertaken or performed by or on behalf of the Bidder Parties shall not limit, qualify, modify or amend the representations, warranties and covenants of, and indemnities by, Sellers made or undertaken pursuant to this Agreement, irrespective of the knowledge and information received (or which should have been received) therefrom by the Bidder Parties.

13.7 Counterparts; Electronic Signatures.

(a) This Agreement may be executed simultaneously in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

(b) The exchange of copies of this Agreement and of signature pages by electronic mail in "portable document format" form, or by any other electronic means intended to preserve the original graphic and pictorial appearance of a document, or by combination of such means, shall constitute effective execution and delivery of this Agreement as to the Parties and may be used in lieu of the original Agreement for all purposes. Signatures of the Parties transmitted electronically shall be deemed to be their original signatures for all purposes.

13.8 Headings. The headings preceding the text of Articles and Sections of this Agreement and the Seller Disclosure Letter are for convenience only and shall not be deemed part of this Agreement.

13.9 Applicable Law and Jurisdiction. Subject to any provision in this Agreement and any Ancillary Document to the contrary, this Agreement (and all documents, instruments, and agreements executed and delivered pursuant to the terms and provisions hereof) shall be governed by and construed and enforced in accordance with the laws of Alberta and the laws of Canada applicable therein. Bidders and Sellers further agree that the CCAA Court shall have jurisdiction over all disputes and other matters relating to (a) the interpretation and enforcement of this Agreement or any Ancillary Document and/or (b) the Acquired Assets and/or Assumed Liabilities and the Parties expressly consent to and agree not to contest such jurisdiction.

13.10 Binding Nature; Assignment. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and permitted assigns, but neither this Agreement nor any of the rights, interest or obligations hereunder shall be assigned by any of the Parties hereto without prior written consent of the other Parties, provided that, the Bidder Parties may grant a security interest in their rights and interests hereunder to their third party lender(s). Nothing contained herein, express or implied, is intended to confer on any Person other than the Parties hereto or their successors and assigns, any rights, remedies, obligations or liabilities under or by reason of this Agreement.

13.11 Designated Purchasers. In connection with the Closing, notwithstanding Section 13.10 or anything to the contrary contained herein, the Bidders and the Purchaser shall be entitled to designate, in accordance with the terms of this paragraph, one or more Subsidiaries or Affiliates of Purchaser to (a) purchase specified Acquired Assets (including specified Assigned Contracts) and pay the corresponding Purchase Price amount, (b) assume specified Assumed Liabilities, (c) employ specified Transferred Employees on and after the Closing Date, (d) perform any of the other covenants and agreements hereunder to be performed by Purchaser, and (e) be entitled to the rights and benefits afforded to Purchaser hereunder (any such Subsidiary or Affiliate of Purchaser that shall be designated in accordance with this clause, a "Designated Purchaser"). Upon any such designation of a Designated Purchaser, such Designated Purchaser shall be solely responsible with respect to the payment of the corresponding Purchase Price (if any), the specified Assumed Liabilities and employment of the specified Transferred Employees. Any reference to Purchaser or Bidder Party made in this Agreement in respect of any right, obligation, purchase, assumption or employment referred to in this paragraph shall be deemed a reference to the appropriate Designated Purchaser, if any, with respect to the applicable obligation or right. All obligations of Purchaser and any Designated Purchaser shall be several and not joint and, notwithstanding anything to the contrary contained herein, neither Purchaser nor any other Designated Purchaser shall have any obligation for any Assumed Liabilities assumed by a particular Designated Purchaser at the Closing and any prior obligations of Purchaser are novated and released. For the avoidance of doubt, no designation of a Designated Purchaser hereunder shall expand or otherwise affect any limitation on Purchaser's obligations hereunder, it being understood that such limitations shall apply to the aggregate Liabilities of Purchaser and any Designated Purchaser(s) hereunder. The above designations shall be made by the Bidder Parties by way of a written notice to be delivered to Sellers in no event later than five (5) Business Days prior to the anticipated Closing Date; provided, however, that no such designation may be made if the timing of such designation would reasonably be expected to delay the Closing; provided, further, that such designation shall not be permitted unless Sellers confirm, acting reasonably, that the Designated Purchaser(s), or any party guaranteeing the obligations of such Designated Purchaser(s), are sufficiently creditworthy. In addition, the Parties agree to modify any Closing deliverables in accordance with the foregoing designation. Any Designated Purchaser(s) are intended third party beneficiaries of this Agreement, and this Agreement may be enforced by such Designated Purchaser(s).

13.12 No Third Party Beneficiaries. This Agreement is solely for the benefit of the Parties hereto and their respective Affiliates and, other than with respect to the Purchaser or Designated Purchasers, no provision of this Agreement shall be deemed to confer upon third parties any remedy, claim, Liability, reimbursement, Claim of Action or other right.

13.13 No Recourse. This Agreement may only be enforced against, and any Claims or causes of Action that may be based upon, arise out of or relate to this Agreement, or the negotiation, execution or performance of this Agreement may only be made against the entities that are expressly identified as Parties hereto and no Bidder Related Party shall have any Liability for any obligations or liabilities of the Parties to this Agreement or for any claim (whether in tort, contract or otherwise) based on, in respect of, or by reason of, the transactions contemplated hereby or in respect of any oral representations made or alleged to be made in connection herewith. Without limiting the rights of Sellers against the Bidder Parties hereunder, in no event shall Sellers or any of their Affiliates, and Sellers agree not to and to cause their Affiliates not to, seek to enforce this Agreement against, make any Claims for breach of this Agreement against, or seek to recover monetary damages from, any Bidder Related Party.

#### 13.14 Tax Matters.

(a) Any sales, use, purchase, transfer, franchise, deed, fixed asset, stamp, documentary stamp, use or similar fees or Taxes (other than any Taxes based on income, receipts, profits, or capital), governmental charges and recording charges (including any interest and penalty thereon) which may be applicable to, or resulting from, or payable by reason of the sale of the Acquired Assets or the assumption of the Assumed Liabilities under this Agreement or the transactions contemplated hereby (the "Transfer Taxes") shall be borne by Purchaser as applicable to the transfer of the Acquired Assets pursuant to this Agreement. Purchaser shall properly file on a timely basis all necessary Tax Returns and other documentation with respect to any Transfer Tax and provide to Sellers evidence of payment of applicable Transfer Taxes.

(b) In the case of any taxable period that begins before, and ends after, the Closing Date (a "Straddle Period"), (i) Taxes imposed on the Acquired Assets that are based upon or related to income or receipts or imposed on a transaction basis (including all related items of income, gain, deduction or credit) will be deemed equal to the amount that would be payable if the Tax year or period ended on the Closing Date, and (ii) any real property, personal property, ad valorem and similar Taxes allocable to the portion of such Straddle Period ending with the end of the day on the Closing Date shall be equal to the amount of such Taxes for the entire Straddle Period multiplied by a fraction, the numerator of which is the number of days during the Straddle Period that is in the Pre-Closing Tax Period and the denominator of which is the number of days in the entire Straddle Period and in each of (i) and (ii), such amounts shall be the responsibility of Sellers (and, for the avoidance of doubt, such amounts shall be an Excluded Liability for purposes of clause (ii) of Section 3.4(e)).

(c) Purchaser shall prepare and file (or cause to be prepared and filed) all Tax Returns for any Pre-Closing Tax Period or Straddle Period in respect of the Acquired Subsidiaries that is required to be filed after the Closing Date. Prior to filing any such Tax Returns, Purchaser shall provide a draft thereof to Sellers for Sellers' review, comment and approval (such approval not to be unreasonably withheld or delayed), unless otherwise required by applicable Law. Purchaser shall consider in good faith any comments provided by Sellers to such Tax Returns. To the extent any Taxes reflected on any such Tax Return are an Excluded Liability, Sellers shall pay to Purchaser the amount of such liability within ten (10) days of receiving notice from Purchaser that such Tax Return has been filed or that Purchaser has paid such Liability, except to the extent such Taxes were paid by Sellers to the applicable Governmental Body prior to the filing of such Tax Return.

(d) Cooperation on Tax Matters. Purchaser shall make available to Sellers, and Sellers shall make available to Purchaser such records, personnel and advisors (i) as any such Party may require for the preparation of any Tax Returns required to be filed by Sellers or Purchaser, as the case may be, and (ii) as Sellers or Purchaser may require for the defense of any audit, examination, administrative appeal, or litigation of any Tax Return in which Sellers or Purchaser was included. Sellers agree to provide all reasonable cooperation to Purchaser, and shall make available to Purchaser such records, personnel and advisors as is reasonably necessary for Purchaser, in determining the Tax attributes of Sellers and their Subsidiaries.

(e) Allocation of Purchase Price. The Purchase Price shall be allocated among the Acquired Assets in accordance with their respective fair market values. As soon as reasonably practicable and in no event later than sixty (60) days after the Closing Date,

Purchaser shall provide Sellers with a draft allocation of the Purchase Price for all purposes, including any liabilities properly included therein among the Acquired Assets and the agreements provided for herein, for all purposes (the “Initial Allocation”). Sellers may make reasonable inquiries of Purchaser and their accountants and employees relating to the Initial Allocation, and Purchaser shall use reasonable efforts to cause any such accountants and employees to cooperate with, and provide such requested information to, Sellers in a timely manner. Within forty-five (45) days of the receipt of the Initial Allocation, Sellers shall either (i) deliver a written notice (the “Objection Notice”) to Purchaser, setting forth in reasonable detail those items in the Initial Allocation that Sellers disputes or (ii) notify Purchaser in writing that they will not provide any Objection Notice (or if Sellers do not deliver an Objection Notice within such forty-five (45)-day period) in which case the Purchaser’s proposed Initial Allocation shall be deemed final, conclusive and binding upon each of the Parties hereto. Within thirty (30) days of Sellers’ delivery of the Objection Notice, Sellers and Purchaser shall attempt to resolve in good faith any disputed items, and failing such resolution, the unresolved disputed items shall be referred for final binding resolution to an Arbitrating Accountant. The fees and expenses of the Arbitrating Accountant shall be paid 50% by Purchaser and 50% by Sellers, unless the Arbitrating Accountant determines that one party’s position was unreasonable in light of the circumstances, in which case such party shall bear 100% of such costs. Such determination by the Arbitrating Accountant shall be (i) in writing, (ii) furnished to Purchaser and Sellers as soon as practicable (and in no event later than thirty (30) days after the items in dispute have been referred to the Arbitrating Accountant), (iii) made in accordance with the principles set forth in this Section 13.14(e), and (iv) non-appealable and incontestable by Purchaser and Sellers. As used herein, the “Allocation” means the allocation of the Purchase Price, the Assumed Liabilities and other related items among the Acquired Assets and the agreements provided for herein as finally agreed between Purchaser and Sellers or ultimately determined by the Arbitrating Accountant, as applicable, in accordance with this Section 13.14(e). The Allocation shall be prepared in accordance with section 1060 of the Code and the Treasury Regulations thereunder (and any similar provision of state, provincial, territorial, local or foreign Law, as appropriate). Purchaser and Sellers shall each report the federal, state provincial, territorial and local income and other Tax consequences of the transactions contemplated hereby in a manner consistent with the Allocation, including, if applicable, the preparation and filing of Forms 8594 under section 1060 of the Code (or any successor form or successor provision of any future Tax Law) with their respective U.S. federal income Tax Returns for the taxable year which includes the Closing Date, and neither will take any position inconsistent with the Allocation, including in the course of any Tax audit, Tax review or Tax litigation relating thereto, unless otherwise required under applicable Law. Sellers shall provide Purchaser and Purchaser shall provide Sellers with a copy of any information required to be furnished to the Secretary of the Treasury under section 1060 of the Code.

(f) Section 22 Election. To the extent available and if requested by Purchaser, in Purchaser’s sole discretion, one or more of DDM, DDCU and Dominion Marketing and Purchaser shall jointly execute and file an election pursuant to section 22 of the Tax Act and the corresponding provisions of any applicable provincial/territorial legislation, in the prescribed manner and within the prescribed time limits, with respect to the sale of accounts receivable, and shall designate therein the portion of the Purchase Price allocated to the accounts receivable pursuant to Section 13.14(e) hereof as consideration paid by Purchaser for the accounts receivable of Sellers.

(g) Subsection 20(24) Election. One or more of DDM, DDCU and Dominion Marketing and Purchaser shall, if applicable, jointly execute and file an election pursuant to subsection 20(24) of the Tax Act and the corresponding provisions of any

applicable provincial/territorial legislation, in the prescribed manner and within the prescribed time limits, as to such amount paid by Sellers to Purchaser for assuming future obligations of the Business or relating to the Canadian Assets. In this regard, DDM, DDCU and Dominion Marketing, as applicable, and Purchaser acknowledge that if such election is made, a portion of the Canadian Assets having a value equal to the elected amount under subsection 20(24) of the Tax Act is being transferred by DDM, DDCU and Dominion Marketing, as applicable, to Purchaser as a payment for the assumption of such future obligations by Purchaser.

(h) Successor Election and Designation. If requested by Purchaser, in Purchaser's sole discretion, (i) one or more of DDM and DDCU and Purchaser shall jointly execute and file an election described in paragraph 66.7(7)(e) of the Tax Act and the corresponding provisions of any applicable provincial/territorial legislation, in the prescribed manner and within the time limits set out in that section, in respect of the "Canadian resource property" (as that term is defined in subsection 66(15) of the Tax Act) acquired by Purchaser from DDM or DDCU, as applicable, under this Agreement and (ii) DDM or DDCU, as applicable, shall execute and file the designation contemplated by subsection 66.7(12.1) of the Tax Act (within the time and in the manner prescribed therefor by the Tax Act) so as to designate in favour of Purchaser the maximum amount of successored pools reasonably available pursuant to the Tax Act, provided that any such filings would not give rise to any Tax Liability to DDM or DDCU, as applicable.

(i) Section 167 Election. At the Closing, each of DDM, DDCU and Dominion Marketing and the Purchaser will, if applicable, jointly execute an election pursuant to subsections 167(1) and (1.1) of the GST Legislation so that it is not required to collect GST in respect of the transfer of the Canadian Assets. The Purchaser shall file the election within the time prescribed by the GST Legislation.

(j) Withholding. Purchaser, and any Person acting on its behalf, shall be entitled to deduct or withhold from the consideration otherwise payable pursuant to this Agreement to any Seller or any other Person such amounts as Purchaser is required to deduct or withhold under the Code, the Tax Act or any Tax Law, with respect to the making of such payment; provided that Purchaser shall consult with the affected Sellers or other Persons in good faith prior to making such withholding or deduction and the Parties hereto shall reasonably cooperate to reduce or eliminate any such amounts. To the extent that amounts are so deducted or withheld, such deducted or withheld amounts shall be treated for all purposes of this Agreement as having been paid to Sellers or the Person in respect of whom such deductions or withholding was made, as the case may be.

### 13.15 Construction.

(a) The information contained in the Seller Disclosure Letter is disclosed solely for the purposes of this Agreement and may include items or information not required to be disclosed under this Agreement, and no information contained in any Seller Disclosure Letter shall be deemed to be an admission by any Party hereto to any third Person of any matter whatsoever, including an admission of any violation of any Laws or breach of any agreement. No information contained in any section of the Seller Disclosure Letter shall be deemed to be material (whether individually or in the aggregate) to the Business, assets, liabilities, financial position, operations, or results of operations of Sellers nor shall it be deemed to give rise to circumstances which may result in a Material Adverse Effect, in each case solely by reason of it being disclosed. Information contained in a section or subsection of the Seller Disclosure Letter (or expressly incorporated therein) shall qualify the representations and



warranties made in the identically numbered Section or, if applicable, Subsection of this Agreement and all other representations and warranties made in any other section or subsection of the Seller Disclosure Letter to the extent its applicability to such section or subsection of the Seller Disclosure Letter is reasonably apparent on its face. References to agreements in the Seller Disclosure Letter are not intended to be a full description of such agreements, and all such disclosed agreements should be read in their entirety, and nothing disclosed in any section or subsection of the Seller Disclosure Letter is intended to broaden any representation or warranty contained in Article V or Article VI.

(b) References in Article V or Article VI to documents or other materials “provided” or “made available” to the Bidder Parties or similar phrases mean that such documents or other materials were present (and available for viewing by the Bidder Parties and its Representatives) in the Data Room.

13.16 Entire Understanding. This Agreement, together with the Ancillary Documents, set forth the entire agreement and understanding of the Parties hereto in respect to the transactions contemplated hereby, and this Agreement and the Ancillary Documents hereto supersede all prior agreements, arrangements and understandings relating to the subject matter hereof. There have been no representations or statements, oral or written, that have been relied on by any Party hereto, except those expressly set forth in this Agreement or in any Ancillary Documents hereto.

13.17 No Presumption Against Drafting Party. Each of the Bidders and Sellers acknowledge that each Party to this Agreement has been represented by legal counsel in connection with this Agreement and the transactions contemplated by this Agreement. Accordingly, any rule or Law or any legal decision that would require interpretation of any claimed ambiguities in this Agreement against the drafting Party has no application and is expressly waived.

13.18 No Punitive Damages. The Parties hereto expressly acknowledge and agree that no Party hereto shall have any Liability under any provision of this Agreement for any punitive damages relating to the breach or alleged breach of this Agreement.

13.19 Time of Essence. Time is of the essence with regard to all dates and time periods set forth or referred to in this Agreement. When calculating the period of time before which, within which or following which any act is to be done or step taken pursuant to this Agreement, the date that is the reference date in calculating such period shall be excluded. If the last day of such period is a non-Business Day, the period in question shall end on the next succeeding Business Day.

13.20 Severability. Whenever possible, each provision or portion of any provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable Law, but if any provision or portion of any provision of this Agreement is held to be invalid, illegal or unenforceable in any respect under any applicable Law or rule in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other provision or portion of any provision in such jurisdiction, and this Agreement shall be reformed, construed and enforced in such jurisdiction as if such invalid, illegal or unenforceable provision or portion of any provision had never been contained herein.

[SIGNATURE PAGES FOLLOW.]

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed and delivered on the date first above written

**BIDDERS:**

**DDJ Capital Management, LLC,  
acting in its capacity as investment  
manager on behalf of certain funds and  
accounts it manages and/or advises that  
are beneficial owners of Second Lien Notes**

By: David J. Breazzano  
Its: President

**Brigade Capital Management, LP,  
on behalf of certain funds and accounts  
that it manages and/or advises**

By:  
Its:

*[Signature Page to Asset Purchase Agreement]*



IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed and delivered on the date first above written

**BIDDERS:**

**DDJ Capital Management, LLC,  
acting in its capacity as investment  
manager on behalf of certain funds and  
accounts it manages and/or advises that  
are beneficial owners of Second Lien Notes**

By:  
Its:

**Brigade Capital Management, LP,  
on behalf of certain funds and accounts  
that it manages and/or advises**

By: Aaron Daniels  
Its: GC/CCO

*[Signature Page to Asset Purchase Agreement]*

**SELLERS:**

**Dominion Diamond Holdings, LLC**

By: Brendan Bell  
Its: Authorized Signatory

**Dominion Diamond Mines ULC**

By: Brendan Bell  
Its: Director

**Dominion Diamond Delaware Company LLC**

By: Kristal Kaye  
Its: Chief Financial Officer

**Dominion Diamond Marketing Corporation**

By: Kristal Kaye  
Its: Chief Financial Officer

**Dominion Diamond Canada ULC**

By: Kristal Kaye  
Its: Chief Financial Officer

*[Signature Page to Asset Purchase Agreement]*

**SELLERS:**

**Dominion Diamond Holdings, LLC**

By: Brendan Bell  
Its: Authorized Signatory

**Dominion Diamond Mines ULC**

By: Brendan Bell  
Its: Director

**Dominion Diamond Delaware Company LLC**

By: Kristal Kaye  
Its: Chief Financial Officer

**Dominion Diamond Marketing Corporation**

By: Kristal Kaye  
Its: Chief Financial Officer

**Dominion Diamond Canada ULC**

By: Kristal Kaye  
Its: Chief Financial Officer

Dominion Finco Inc.

By: Brendan Bell  
Its: Authorized Signatory

*[Signature Page to Asset Purchase Agreement]*

## **SCHEDULE A**

### **ASSIGNED AND EXCLUDED CONTRACTS**

***[To be finalized pursuant to Section 3.6.]***

**SCHEDULE B**  
**FIRST LIEN LENDER MSA**

## **MUTUAL SUPPORT AGREEMENT**

**WHEREAS**, this mutual support agreement (the “**Support Agreement**”), dated as of December 6, 2020, sets out the agreement among (i) the undersigned first lien secured lenders (collectively, the “**1L Lenders**”) to Dominion Diamond Mines ULC (the “**Company**”) and various of its affiliates pursuant to a Revolving Credit Agreement dated as of November 1, 2017 (the revolving facility draws outstanding thereunder and interest accrued thereon being the “**First Lien Debt**”); and (ii) the undersigned holders of the 7.125% secured second lien notes of the Company (the “**Second Lien Notes**”) (collectively, the “**2L AHG**”) regarding an acquisition transaction in respect of the Company (the “**Transaction**”), as further described in the term sheet attached as Schedule A (the “**Term Sheet**”, with the terms of the Transaction set out therein and herein being, collectively, the “**Transaction Terms**”), which Transaction Terms are to form the basis of the Transaction to be implemented within the Company’s ongoing proceedings under the *Companies’ Creditors Arrangement Act* (the “**Proceedings**”).

**NOW THEREFORE**, the 1L Lenders and the 2L AHG (collectively the “**Parties**” and each a “**Party**”) hereby agree as follows:

### **1. Transaction**

The Transaction Terms as agreed among the Parties are set forth in this Support Agreement and in the Term Sheet, which Term Sheet is incorporated herein and made a part of this Support Agreement. In the case of a conflict between the provisions contained in the main body of this Support Agreement and the Term Sheet, the provisions of the main body of this Support Agreement shall govern.

### **2. Subject Debt Purchase**

- (a) Each member of the 2L AHG irrevocably and unconditionally agrees, on a several basis in accordance with its respective amount set forth on its signature page to this Support Agreement, to purchase the Subject Debt (as defined below) from the 1L Lenders on the earlier of the closing of the Transaction and January 29, 2021 (the “**Subject Debt Purchase**”). The Parties shall enter into assignment agreements in respect of their applicable portion of the Subject Debt Purchase substantially in the form of The Loan Syndication and Trading Association (“**LSTA**”) form attached as Schedule B.
- (b) For the purposes of this Support Agreement, “**Subject Debt**” shall mean (i) in the event that the Transaction is not completed prior to January 29, 2021, an aggregate principal amount of US\$15 million of the funded portion of the First Lien Debt; or (ii) in the event of the completion of the Transaction prior to January 29, 2021, an aggregate principal amount of US\$15 million of the term loan debt to be received by the 1L Lenders under the Transaction as contemplated hereby. For greater certainty, Subject Debt shall not include any debts or liabilities relating to letters of credit issued by the 1L Lenders for the benefit of the Company.
- (c) The aggregate purchase price for the Subject Debt shall be US\$15 million.

- (d) The 2L AHG shall have no voting rights with respect to the Subject Debt other than with respect to changes to any of the following terms of the Subject Debt, which shall require approval of all Subject Debt holders: (i) principal amount; (ii) term or maturity date; (iii) interest rate or fees; (iv) payment dates; (v) security interests, charges or guarantees; (vi) pro rata sharing rights among lenders; (vii) agent and agent's powers; (viii) rights of transfer, sale and assignment by lenders; (ix) information, disclosure, reporting, Company representations and warranties, and notice rights; and (x) the voting and approval rights provided for in this Section (d).
- (e) For the avoidance of doubt, the Subject Debt Purchase shall not be subject to any conditions precedent to completion, including but not limited to completion of the Transaction, but shall be conditional on satisfaction and compliance by the 1L Lenders of their obligations and commitments under this Support Agreement.

### 3. Representations and Warranties

Each Party, severally and not jointly, hereby represents and warrants to the other Parties that as of the date hereof:

- (a) it is the sole beneficial owner of First Lien Debt and Second Lien Notes (collectively, "**Debt**"), as applicable, in the principal amount(s) set forth on its signature page to this Support Agreement (together with all obligations owing in respect thereof, including accrued and unpaid interest and any other amount that such Party is entitled to claim in respect thereof, its "**Relevant Debt**"), and no other Debt.
- (b) it (i) is a sophisticated party with sufficient knowledge and experience to evaluate properly the terms and conditions of this Support Agreement; (ii) has conducted its own analysis and made its own decision to enter into this Support Agreement; (iii) has obtained such independent advice in this regard as it deemed appropriate; and (iv) has not relied in such analysis or decision on any person other than its own independent advisors;
- (c) this Support Agreement has been duly authorized, executed and delivered by it, and, assuming the due authorization, execution and delivery by the other Parties, this Support Agreement constitutes a legal, valid and binding obligation of such Party, enforceable against such Party in accordance with its terms, subject to laws of general application and bankruptcy, insolvency and other similar laws affecting creditors' rights generally and general principles of equity;
- (d) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization and has all approvals necessary to execute and deliver this Support Agreement and to perform its obligations hereunder; and
- (e) it has not deposited any of its Relevant Debt into a voting trust, or granted (or permitted to be granted) any proxies or powers of attorney or attorney in fact, or entered into a voting agreement, understanding or arrangement with respect to its Relevant Debt that would reasonably be expected to restrict in any material manner the ability of such Party to comply with its obligations under this Support Agreement, including the obligations in Section 4.

#### 4. Parties' Covenants and Agreements

Each Party hereby acknowledges, covenants and agrees:

- (a) to the Transaction and the Transaction Terms and the implementation of same within the Proceedings;
- (b) not to, directly or indirectly, from the date hereof to the date this Support Agreement is terminated, sell, assign, lend, pledge, hypothecate, dispose or otherwise transfer any of its Relevant Debt or any rights or interests therein (or permit any of the foregoing with respect to any of its Relevant Debt) or enter into any agreement, arrangement or understanding in connection therewith except with the prior written consent of the other Parties, provided that each Party may transfer some or all of its Relevant Debt to any other Party or to a transferee that has executed a joinder agreement in form and substance satisfactory to the other Parties, acting reasonably, whereby such transferee is bound by the terms of this Support Agreement in respect of such transferred Relevant Debt and in which event the transferor shall be deemed to relinquish its rights (and be released from its obligations) under this Support Agreement in respect of such Relevant Debt;
- (c) not to take any action, or omit to take any action, that is inconsistent with its obligations under this Support Agreement or that would frustrate, hinder or delay the consummation of the Transaction;
- (d) not to propose, file, solicit, or otherwise support any alternative transaction, offer, restructuring, liquidation, workout or plan of compromise or arrangement or reorganization of, for or in respect of the Company that is inconsistent with the Transaction;
- (e) to the extent applicable, to vote (or cause to be voted) all of its Relevant Debt in favour of the approval, consent ratification and adoption of the Transaction (and any actions required in furtherance thereof) and against the approval, consent, ratification and adoption of any matter or transaction that, if approved, consented to, ratified or adopted could reasonably be expected to delay, challenge, frustrate or hinder the consummation of the Transaction;
- (f) to disclose this Agreement to the Company and its representatives and to allow the Company to disclose the existence and essential terms of this Agreement in any public disclosure including, without limitation, in any press releases and court materials relating to the approval and implementation of the Transaction;
- (g) that the Company shall be permitted to make the expenditures set out in the attached Schedule C for the restart of the Ekati mine prior to obtaining court approval of the APA (as defined below) in the Proceedings, which is anticipated to occur by December 11, 2020, and only such other expenditures for the restart of the Ekati mine as may be expressly consented to by the Parties (such consent not to be unreasonably withheld);
- (h) in the event that approval of the APA in the Proceedings has not been obtained by December 18, 2020, the Parties shall preserve their rights to oppose or



support expenditures by the Company to restart the Ekati mine prior to obtaining approval of the APA in the Proceedings;

- (i) following approval of the APA in the Proceedings and provided that there shall not exist or have occurred any material adverse change that would have a materially adverse effect on or prevent or materially delay the consummation of the Transaction, to support the making of the expenditures set out in the Company's Ekati mine restart budget attached as Schedule D and to support the taking of other reasonable Company actions that have been determined by the Company in consultation with the Parties in furtherance of the re-start of full operations at the Ekati mine as soon as possible; and
- (j) for the avoidance of doubt, the Schedules hereto cannot be modified in any manner whatsoever without the express consent of each of the Parties hereto, in their sole discretion.

## **5. Negotiation of Documents and Transaction Terms**

- (a) Each Party hereby covenants and agrees (i) to cooperate and negotiate in good faith, and consistent with this Support Agreement, the definitive documents implementing, achieving and relating to the Transaction and any Court orders relating thereto, and (ii) to the extent it is a party thereto, to execute, deliver and perform its obligations under such documents.
- (b) The Parties shall cooperate with each other and shall coordinate their activities in respect of (i) the timely satisfaction of conditions with respect to the effectiveness of the Transaction, (ii) all matters concerning the implementation of the Transaction, and (iii) the pursuit and support of the Transaction, subject to the terms hereof, and each of the Parties shall take such actions as may be reasonably necessary to carry out the purposes and intent of this Support Agreement.
- (c) The Parties acknowledge and agree that the Transaction Terms set out in this Agreement are intended to be indicative and not exhaustive or definitive with respect to the proposed Transaction. Any obligations and commitments of the Parties to complete the Transaction (including, without limitation, with respect to the 2L AHG's obligations regarding the New Money Commitment set out in the Term Sheet) are subject to and conditional on the negotiation, settlement and execution of: (i) a definitive APA (as defined below) satisfactory to the Parties; and (ii) other definitive Transaction documents satisfactory to the 2L AHG; in each case containing additional terms and conditions not specified in this Agreement. Nothing herein shall be interpreted as restricting the discretion of: (x) the Parties with respect to the negotiation and settlement of such definitive APA; and (y) the 2L AHG with respect to the negotiation and settlement of such other definitive Transaction documents; in each case in a manner consistent with 5(a)5(a) and (b) hereof.

## **6. Transaction Process/Structure**

Unless otherwise agreed by the Parties, the Transaction shall be implemented pursuant to an asset purchase agreement (the "**APA**") to be executed by DDJ Capital

Management, LLC, Brigade Capital Management, LP, and the Company under which a newly created entity or entities ("**NewCo**") shall acquire substantially all of the assets of the Company other than the Company's Diavik mine joint venture agreement interests but including (subject to the 1L Lenders' continuing lien until cash collateralization or cancellation of all Diavik letters of credit issued by the 1L Lenders and the payment of all related fees) all receivables, diamond production, claims, sales proceeds and other rights and assets realized or recovered in respect of such Diavik mine joint venture agreement interests (collectively, the "**Diavik Assets**"). The Parties shall agree to a mechanism for the pursuit of the realization and recovery of the Diavik Assets, which among other things shall provide for a duly authorized independent official to have control and carriage thereof and for the costs thereof to be funded initially by the Company's payment at closing of the Transaction of US\$1,000,000 from the Transaction proceeds at NewCo's direction to such official and thereafter to be funded at the cost of the 1L Lenders if they so elect in their sole discretion. The APA shall have terms and conditions satisfactory to the Parties and consistent with this Support Agreement including, without limitation, with respect to: (i) the Company's prompt payment and reimbursement, upon and from time to time following court approval of the APA in the Proceedings, of all the 2L AHG's reasonable and documented (with only brief summary descriptions of service) costs and expenses incurred from and after the commencement of the Proceedings; and (ii) the Company's prompt payment of a break fee in the event that the Company APA is terminated or the Transaction is not completed for any reason other than the non-compliance by DDJ Capital Management, LLC or Brigade Capital Management, LP with their obligations under the APA and an alternative transaction is consummated within nine (9) months of the date of the APA for the sale or restructuring of the Company or any material portion of its assets pursuant to which the First Lien Debt is repaid in full in cash. The Parties shall work cooperatively in furtherance of obtaining court approval for the APA on December 11, 2020 or as soon thereafter as is practicable.

## 7. Termination

- (a) 1L Lenders holding in aggregate not less than half (50%) of the aggregate principal amount of the First Lien Debt may terminate this agreement, in their sole discretion, by providing written notice to the 2L AHG in accordance with Section 11(l)11(l) hereof: (i) upon the breach of any representation, warranty, covenant or acknowledgement of a Party within the 2L AHG made in this Support Agreement that could reasonably be expected to have a material adverse impact on the Transaction and that remains uncured within five (5) business days after the receipt by the 2L AHG of written notice of such breach (unless the event giving rise to the termination right is caused by the 1L Lender(s)); or (ii) if the Transaction has not been completed by January 29, 2021 or such other date as the Parties may agree in writing (the "**Outside Date**").
- (b) Members of the 2L AHG holding in aggregate not less than half (50%) of the aggregate principal amount of Second Lien Notes held by the 2L AHG may terminate this agreement, in their sole discretion, by providing written notice to the 1L Lenders in accordance with Section 11(l)11(l) hereof: (i) upon the breach of any representation, warranty, covenant or acknowledgement of the 1L Lenders made in this Support Agreement that could reasonably be expected to have a material adverse impact on the Transaction and that remains uncured within five (5) business days after the receipt by the 1L Lenders of written notice

of such breach (unless the event giving rise to the termination right is caused by a Party or Parties within the 2L AHG); or (ii) if the Transaction has not been completed by the Outside Date.

## **8. Effect of Termination**

- (a) Subject to paragraphs 8(b) and 8(c) below, this Support Agreement, upon its termination, shall be of no further force and effect, and each Party hereto shall be automatically and simultaneously released from its commitments, undertakings, covenants, and agreements under or directly related to this Support Agreement.
- (b) Each Party shall be responsible and shall remain liable for any breach of this Support Agreement by such Party occurring prior to the termination of this Support Agreement.
- (c) Notwithstanding the termination of this Support Agreement pursuant to Section 8, the agreements and obligations of the Parties in 2 and 11 hereof shall survive such termination and shall continue in full force and effect for the benefit of the Parties in accordance with the terms hereof.

## **9. Further Assurances**

Each Party shall take all such actions as are commercially reasonable, deliver to the other Parties such further information and documents and execute and deliver to the other Parties such further instruments and agreements as another Party shall reasonably request to consummate or confirm the transactions provided for in this Support Agreement, to accomplish the purpose of this Support Agreement or to assure to the other Party the benefits of this Support Agreement, including, the consummation of the Transaction.

## **10. Public Announcements**

All public announcements made in respect of this Support Agreement shall be in form and substance acceptable to the Parties, each acting reasonably. Notwithstanding the foregoing, nothing herein shall prevent a Party from making public disclosure in respect of the Transaction to the extent required by applicable law.

## **11. Miscellaneous**

- (a) The headings in this Support Agreement are for reference only and shall not affect the meaning or interpretation of this Support Agreement.
- (b) Unless the context otherwise requires, words importing the singular shall include the plural and vice versa and words importing any gender shall include all genders.
- (c) This Support Agreement (including the Term Sheet), as it may be modified, amended and supplemented pursuant to Section 11(d)11(d) hereof, constitutes the entire agreement and supersedes all prior agreements and understandings,

both oral and written, among the Parties with respect to the subject matter hereof.

- (d) This Support Agreement may be modified, amended or supplemented as to any matter in writing (which may include e-mail) by the Parties.
- (e) Any person signing this Support Agreement in a representative capacity (i) represents and warrants that he/she is authorized to sign this Support Agreement on behalf of the Party he/she represents and that his/her signature upon this Support Agreement will bind the represented Party to the terms hereof, and (ii) acknowledges that the other Parties hereto have relied upon such representation and warranty.
- (f) Any provision of this Support Agreement may be waived if, and only if, such waiver is in writing (which may include e-mail) by the Party against whom the waiver is to be effective. No failure or delay by any Party in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise.
- (g) Any date, time or period referred to in this Support Agreement shall be of the essence except to the extent to which the Parties agree in writing to vary any date, time or period, in which event the varied date, time or period shall be of the essence.
- (h) This Support Agreement shall be governed by, construed and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein (excluding any conflict of laws rule or principle which might refer such construction to the laws of another jurisdiction) and all actions or proceedings arising out of or relating to this Support Agreement shall be heard and determined exclusively in the courts of the Province of Ontario.
- (i) It is understood and agreed by the Parties that money damages would not be a sufficient remedy for any breach of this Support Agreement and each non-breaching Party shall be entitled, in addition to any other remedy that may be available under applicable law, to specific performance and injunctive or other equitable relief as a remedy of any such breach, including an order by a court of competent jurisdiction requiring any Party to comply promptly with any of such obligations.
- (j) Unless expressly stated otherwise herein, this Support Agreement is intended to solely bind and inure to the benefit of the Parties and their respective successors, permitted assigns, heirs, executors, administrators and representatives. No other person or entity shall be a third party beneficiary hereof.
- (k) Except as is otherwise contemplated herein, no Party may assign, delegate or otherwise transfer any of its rights, interests or obligations under this Support Agreement without the prior written consent of the other Parties hereto.
- (l) All notices, requests, consents and other communications hereunder to any Party shall be deemed to be sufficient if contained in a written instrument

delivered in person or sent by internationally-recognized overnight courier or e-mail. All notices required or permitted hereunder shall be deemed effectively given: (i) upon personal delivery to the Party to be notified, (ii) when sent by email if sent during normal business hours of the recipient and, if not, then on the next business day of the recipient; or (iii) one (1) business day after deposit with an internationally recognized overnight courier, specifying next day delivery, with written verification of receipt. All deliveries required or permitted hereunder shall be deemed effectively made: (A) upon personal delivery to the Party receiving the delivery; (B) one (1) business day after deposit with an internationally recognized overnight courier, specifying next day delivery, with written verification of receipt; or (C) upon receipt of delivery in accordance with instructions given by the Party receiving the delivery. Any Party may change the address to which notice should be given to such Party by providing written notice to the other Parties hereto of such change. The address and email for each of the Parties shall be as follows:

(i) If to one or more of the 1L Lenders at:

The address set forth for each applicable 1L Lender on its signature page to this Support Agreement, with a required copy (which shall not be deemed notice) to:

Osler, Hoskin & Harcourt LLP  
100 King Street West, Suite 6200  
Toronto, Ontario  
M5X 1B8

Attention: Marc Wasserman & Michael De Lellis  
Email: [mwasserman@osler.com](mailto:mwasserman@osler.com); [mdelellis@osler.com](mailto:mdelellis@osler.com)

-and-

Cahill Gordon & Reindel LLP  
32 Old Slip, New York,  
NY 10005

Attention: Joel H. Levitin  
Email: [jlevitin@cahill.com](mailto:jlevitin@cahill.com)

(ii) If to the 2L AHG at:

The address set forth on the applicable signature pages to this Support Agreement, with a required copy (which shall not be deemed notice) to:

Torys LLP  
79 Wellington St., 30th Floor  
Toronto, Ontario  
M5K 1N2

Attention: Tony DeMarinis  
Email: [tdemarinis@torys.com](mailto:tdemarinis@torys.com)

- (m) The Parties acknowledge that each member of the 2L AHG is an investment manager (a “**Manager**”) who holds Second Lien Notes in its managed and advisory accounts. All representations, warranties, covenants and other agreements made by a Manager herein are being made: (i) on behalf of holders of Second Lien Notes that are separately managed or advisory accounts of the Manager; and (ii) only with respect to the assets managed by such Manager on behalf of such holders of Second Lien Notes, and shall not apply to (or be deemed to be made in relation to) any assets or interests that may be beneficially owned by such holders of Second Lien Notes that are not held through accounts managed by such Manager.
- (n) If any term, provision, covenant or restriction of this Support Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions, including terms, covenants and restrictions, of this Support Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated and the Parties shall negotiate in good faith to modify this Support Agreement so as to effect the original intent of the Parties as closely as possible in a reasonably acceptable manner so that the transactions contemplated herein are consummated as originally contemplated to the greatest extent possible.
- (o) This Support Agreement may be executed by electronic means and in one or more counterparts, all of which shall be considered one and the same agreement.

*[Remainder of Page Intentionally Left Blank]*

**IN WITNESS WHEREOF**, the undersigned has caused this Support Agreement to be duly executed and delivered by its proper and duly authorized officer as of the date first written above.

Name of Party:

\_\_\_\_\_

By:

\_\_\_\_\_

Name:

Title:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Debt	Principal Amount
First Lien Debt	
Second Lien Notes	
Amount of Subject Debt Purchase	

## SCHEDULE A

### TERM SHEET<sup>1</sup>

#### New Money Commitment:

- US\$70 million New 2L Bond funded by the 2L AHG (and by other Second Lien Noteholders if the APA or applicable court orders provide for their participation in such funding, in which case the 2L AHG shall fully backstop the funding), with the following terms:
  - Interest Rate: 5.0% cash / 12.5% PIK (compounded)
  - Maturity Date: 12/31/2027
  - Security: Second Lien on Ekati and other assets of NewCo (or the restructured Company, if applicable in an alternative transaction process)
  - Backstop Fees: To be determined by the parties, acting reasonably
  - Other: Stapled to 100% of the equity of NewCo (or the restructured Company, if applicable in an alternative transaction process), or such other agreed structure
  - Other: No priority baskets available
- US\$25 million DIP loan to be provided by 2L AHG if necessary for the purposes of funding Company operations in the Proceedings and to execute on completing the Transaction;
- DIP loan will rank *pari passu* to the funded portion of the First Lien Debt (the "RCF") and will be converted into New 2L Bond debt on completion of Transaction.

#### RCF Lenders Receive:

- A \$70 million Term Loan (plus approximately C\$6 million of pre-filing LCs to secure the Ekati operating licenses and permits) with the following terms:
  - Interest Rate:
    - Year 1: L + 500 (1.00% LIBOR floor)
    - Year 2: L + 600 (1.00% LIBOR floor)
    - Year 3: L + 800 (1.00% LIBOR floor)
    - Year 4: L + 1000 (1.00% LIBOR floor)
  - Amortization Rate: 7.5% / year (on initial principal amount)
  - Maturity Date: 12/31/2024
  - Security: First Lien on Ekati and other assets of NewCo (or the restructured Company, if applicable in an alternative transaction process)
- The approximately C\$6 million of pre-filing LCs securing certain Ekati operating licenses and permits are to be rolled forward on the above terms;
- The Term Loan shall be structured as either: (i) an assumption and amendment of the funded portion of the existing First Lien Debt; or (ii) repayment of the funded portion of the existing First Lien Debt and the

<sup>1</sup> All amounts in US\$ millions, unless otherwise noted. This is a non-exhaustive list of key economic terms and conditions



advance of new funding to NewCo in respect of the Term Loan, all on closing.

- \$10 million of Incremental 2L Bond with the following terms:
  - Interest Rate: 5.0% cash / 12.5% PIK (compounded)
  - Maturity Date: 12/31/2027
  - Security: Second Lien on Ekati and other assets of NewCo (or the restructured Company, if applicable in an alternative transaction process) for the Incremental 2L Bond (which will be *pari passu* with the New 2L Bond)
  - Other: Callable at par plus accrued interest
  - Not stapled to equity of NewCo (or the restructured Company, if applicable in an alternative transaction process)
- \$8.5 million New 3L Bond with the following terms:
  - Interest Rate: 14% PIK (compounded)
  - Maturity Date: 12/31/2030
  - Security: Third Lien on Ekati and other assets of NewCo (or the restructured Company, if applicable in an alternative transaction process)
  - Change of Control Put Right (percentage is applicable to principal + compounded PIK):
    - Year 1-2: 200%
    - Year 3: 175%
    - Year 4: 150%
    - Year 5: 125%
    - Year 6 and thereafter: 100%
  - Callable at applicable put right price
- Any net proceeds realized with respect to the Company's interest in Diavik on the sale of Diavik diamonds delivered to or for the benefit of the Company following the date hereof or otherwise will be used first to cash collateralize any outstanding Diavik LCs or to repay the 1L Lenders for any Diavik LCs that are called (not to exceed the total amount of any outstanding Diavik LCs existing as of the date hereof, less any existing cash collateral for those Diavik LCs);
- 1L Lenders to retain their First Lien claims against the Company's Diavik interests and any other assets not purchased by NewCo for the approximately C\$105 million existing as of the date hereof (less cash collateral currently held) of pre filing LCs securing the Company's Diavik reclamation obligations
- 1L Lenders to keep \$15 million cash collateral securing the Diavik LCs
- 25% of quarterly net excess free cash flow, as reasonably determined by NewCo in accordance with generally accepted accounting standards and subject to maintenance at all times of minimum NewCo cash-on-hand of at least US\$15 million, to be utilized within forty-five days of the calendar quarter ending on December 31, 2021 and each

calendar quarter thereafter at the direction of NewCo (the "**Cash Flow Terms**") to cash collateralize Ekati LCs or paydown Term Loan and (i) no dividends or distributions shall be declared or paid; (ii) no NewCo or Company shares or equity interests shall be redeemed, purchased or otherwise acquired; and (iii) no loans or other benefits shall be given to direct or indirect shareholders or holders of other equity interests of NewCo or the Company, in each case until the Term Loan is paid down in full in cash. The 2L AHG represents and warrants that the Cash Flow Terms, including the standard for determining excess free cash flow, minimum cash-on-hand requirements and utilization terms, are each as or more favorable to the 1L Lenders as those terms that are or may be provided to any sureties. If, on or after the date hereof, any surety is provided any terms that differ from the Cash Flow Terms, this Agreement shall be, without any further action by any Party, automatically amended and modified in an economically and legally equivalent manner such that the 1L Lenders shall receive the benefit of any more favourable term to be provided to such surety. The 2L AHG shall provide immediate written notice to the Agent of any such terms being provided to a surety and the automatic changes being provided to the 1L Lenders as a result.

- The value of all payments or cash collateral received by the 1L Lenders in respect of: (i) the Company's Diavik mine joint venture agreement interests (including, without limitation, receivables, diamond production, claims, sales proceeds and other rights and assets); and (ii) the existing \$15 million cash collateral securing the Diavik LC's; shall in no circumstance exceed the total liability exposure of the 1L Lenders under the Diavik LC's

**Second Lien Notes:**

- Right to participate in the New 2L Bond if provided for in the APA or applicable court orders.

**Unsecured Claims:**

- Critical vendors paid in cash, unless otherwise agreed by the 1L Lenders and the 2L AHG.

**Surety Bonds:**

- \$205 million commitment remains outstanding and on terms to be determined
- Cash collateralized over time, terms to be determined, subject to the provisions set forth under "*RCF Lenders Receive*".

**Existing Equity:**

- No consideration shall be given to or for the benefit of the existing equity of the Company or any existing Second Lien Noteholder other than, if provided for in the APA or applicable court orders, participation in funding the New 2L Bond.

**Other:**

- Payment of all remaining professional fees upon emergence
- Mine to restart as soon as possible, in consultation with the 2L AHG;
- Need to get an acceptable deal with the sureties / GNWT;
- Transaction to close on or before January 29, 2021; and
- The Approval & Vesting Order with respect to the Transaction shall be in form and substance satisfactory to the 1L Lenders, acting reasonably.



**SCHEDULE B**  
**LSTA FORM**

**SCHEDULE C**  
**APPROVED EKATI RESTART EXPENDITURES**

**SCHEDULE D**  
**COMPANY'S EKATI RESTART BUDGET**

Document comparison by Workshare Compare on Thursday, December 10, 2020 9:30:38 PM

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Moved to	1
Style change	0
Format changed	0
Total changes	77

# APPENDIX B



COURT FILE NUMBER 2001-05630

COURT COURT OF QUEEN'S BENCH OF ALBERTA IN  
BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE CALGARY

APPLICANTS **IN THE MATTER OF THE COMPANIES' CREDITORS  
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR  
ARRANGEMENT OF DOMINION DIAMOND MINES ULC,  
DOMINION DIAMOND DELAWARE COMPANY, LLC,  
DOMINION DIAMOND CANADA ULC, WASHINGTON  
DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND  
HOLDINGS, LLC, DOMINION FINCO INC. AND DOMINION  
DIAMOND MARKETING CORPORATION**

DOCUMENT **APPROVAL AND VESTING ORDER**

ADDRESS FOR SERVICE **BLAKE, CASSELS & GRAYDON LLP**  
AND CONTACT Barristers and Solicitors  
INFORMATION OF PARTY 3500 Bankers Hall East  
FILING THIS DOCUMENT 855 – 2<sup>nd</sup> Street SW  
Calgary, Alberta T2P 4J8

Attention: Peter L. Rubin / Peter Bychawski /  
Claire Hildebrand / Morgan Crilly  
Telephone No.: 604.631.3315 / 604.631.4218 /  
604.631.3331 / 403.260.9657  
[Email: peter.rubin@blakes.com](mailto:peter.rubin@blakes.com) /  
[peter.bychawski@blakes.com](mailto:peter.bychawski@blakes.com) /  
[claire.hildebrand@blakes.com](mailto:claire.hildebrand@blakes.com) /  
[morgan.crilly@blakes.com](mailto:morgan.crilly@blakes.com)

Fax No.: 604.631.3309

**DATE ON WHICH ORDER WAS PRONOUNCED:** December 11, 2020

**LOCATION OF HEARING:** Calgary

**NAME OF JUDGE WHO MADE THIS ORDER:** The Hon. Madam Justice K. Eidsvik

**UPON THE APPLICATION** by Dominion Diamond Mines ULC ("**Dominion Diamond**"), Dominion Diamond Holdings, LLC ("**Dominion Holdings**"), Dominion Diamond Delaware Company LLC ("**DDC**"), Dominion Diamond Marketing Corporation ("**Dominion Marketing**"), Dominion Diamond Canada ULC ("**DDCU**"), Dominion Finco Inc. ("**Finco**") (Dominion Diamond, Dominion Holdings, DDC, Dominion Marketing, DDCU and Finco collectively, the "**Sellers**") and Washington Diamond Investments, LLC ("**Parent**") for, *inter alia*, an order (i) approving the sale transaction (the "**Transaction**") contemplated by the Asset Purchase Agreement (as may be further amended from time to time in accordance with the terms thereof and this Order, the "**Purchase Agreement**") dated as of December 6, 2020, by and among, *inter alia*, the Sellers, as sellers, and DDJ Capital Management, LLC and Brigade Capital Management, LP (the "**Contracting Purchasers**"), a copy of which is attached as **Schedule "A"** hereto, (ii) vesting in one or more entities duly designated by the Contracting Purchasers in accordance with the Purchase Agreement (collectively, the "**Purchasers**" and each, a "**Purchaser**") all of the Sellers' right, title and interest in and to the Acquired Assets, free and clear of all Encumbrances other than the Permitted Encumbrances (as defined below), and (iii) granting related relief;

**AND UPON** having read the Application, the Affidavits of Brendan Bell ~~sworn~~ sworn May 21, 2020, June 12, 2020, October 4, 2020, October 23, 2020, and December [●], 2020; the Affidavits of John Startin sworn May 21, 2020, June 12, 2020, and October 5, 2020; **AND UPON** reading the Eleventh Report of FTI Consulting Canada Inc. (the "**Monitor**"), filed;

**AND UPON** hearing counsel for the Applicants, counsel for the Purchasers, counsel for the Monitor, counsel for Credit Suisse AG, Cayman Islands Branch, [counsel for Diavik Diamond Mines \(2012\) Inc. \("\*\*DDMI\*\*"\)](#) and those other counsel present;

**IT IS HEREBY ORDERED AND DECLARED THAT:**

**SERVICE**

1. Service of notice of this Application and supporting materials is hereby declared to be good and sufficient, no other Person is required to have been served with notice of this Application and time for service of this Application is abridged to that actually given.

## DEFINED TERMS

2. All capitalized terms not defined herein shall have the respective meanings ascribed to them in the Purchase Agreement or the Initial Order of the Honourable Madam Justice K. Eidsvik dated April 22, 2020 (as amended and restated on May 1, 2020, further amended on May 15, 2020, and further amended and restated on June 19, 2020, and as may be further amended, restated or supplemented from time to time, the “**Initial Order**”).

## APPROVAL OF TRANSACTION

3. The Purchase Agreement is hereby approved in its entirety. The Transaction is hereby approved, and the execution of the Purchase Agreement by the Sellers is hereby authorized, ratified, confirmed, and approved, with such minor amendments as the Sellers may deem necessary with the consent of the Monitor. The Sellers are hereby authorized and directed to complete the Transaction subject to the terms of the Purchase Agreement, to perform their obligations under the Purchase Agreement and any ancillary documents related thereto (collectively, the “**Transaction Documents**”), and to take such additional steps and execute such additional documents (including any further amendments to the Purchase Agreement) as may be necessary or desirable for the completion of the Transaction or for the conveyance of the Acquired Assets to the Purchasers.

## VESTING OF PROPERTY

4. Upon delivery of a Monitor’s certificate to the Purchasers substantially in the form set out in **Schedule “B”** hereto (the “**Monitor’s Certificate**”), all of the Sellers’ right, title and interest in and to the Acquired Assets described in the Purchase Agreement shall vest absolutely in the name of each applicable Purchaser free and clear of and from any and all caveats, security interests or similar interests, hypothecations, pledges, mortgages, deeds, deeds of trust, liens, encumbrances, trusts or statutory, constructive or deemed trusts, reservations of ownership, title defects or imperfections, royalties, leases, options, rights including rights of pre-emption or first refusal, privileges, interests, assignments, easements, rights of way, encroachments, restrictive covenants, actions, demands, judgments, executions, levies, taxes, writs of enforcement, proxies, voting trusts or agreements, transfer restrictions under any shareholder agreement or

similar agreements, charges, conditional sales or other title retention agreements or other impositions, restrictions on transfer or use of any nature whatsoever or other claims, whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the “**Encumbrances**”), including, without limiting the generality of the foregoing:

- (a) any encumbrances or charges as created by the Initial Order or any other Orders granted in the within CCAA proceedings;
- (b) any charges, security interests or claims evidenced by registrations, filing or publication pursuant to (i) the *Personal Property Security Act*, SNWT 1994, c 8 (NWT); (ii) the *Personal Property Security Act*, RSO 1990, c P.10 (Ontario); the *Personal Property Security Act*, RSA 2000, c P-7 (Alberta); (iii) the *Personal Property Security Act*, RSBC 1996, c 359 (British Columbia); (iv) the Uniform Commercial Code (U.C.C.); (v) the *Land Titles Act*, RSNWT 1988, c 8 (the “**Land Titles Act (NWT)**”); the (vi) *Northwest Territories Mining Regulation*, SOR/2014-68; and (vii) any other personal or real property registration system;
- (c) any charges, security interests or claims evidenced by registrations at the Canadian Intellectual Property Office or similar intellectual property offices in Canada or elsewhere in the world; and
- (d) any liens or claims of lien under the (i) *Miners Lien Act*, RSNWT 1988, c M-12 (NWT); and (ii) the *Garage Keepers’ Lien Act*, RSA 2000, c G-2 (Alberta);

but in each case, excluding the permitted encumbrances listed in **Schedule “E”** hereto (collectively, the “**Permitted Encumbrances**”), [\[NTD: DDML security to be added to Schedule “E”\]](#) as such Permitted Encumbrances may be hereafter modified pursuant to paragraph 5 of this Order, and for greater certainty, this Court orders that all Claims including Encumbrances, other than Permitted Encumbrances, affecting or relating to the Acquired Assets, are hereby expunged, discharged and terminated as against the Acquired Assets. Except as set forth in the last sentence of Section 8.1(a) of the Purchase Agreement, the Purchasers’ acquisition of the Acquired Assets shall be free and clear of any “successor liability” Liabilities or Claims of any nature whatsoever, whether known or unknown and whether asserted or unasserted as of the Closing;

*provided* that nothing in this sentence shall limit Purchasers' agreement to assume the Assumed Liabilities in accordance with the terms of the Purchase Agreement.

5. If Schedule "E" to this Order designates any Permitted Encumbrances that prior to Closing are determined to relate to agreements which are not Assigned Contracts, such Permitted Encumbrances shall become Encumbrances and the Sellers shall give prompt written notice thereof to the beneficiaries of such Encumbrances. Upon Sellers giving such written notice, which shall be given not less than 10 days prior to Closing, title in the Acquired Assets shall vest in the Purchaser free and clear of all such Encumbrances at Closing without need for further order of this Court and notwithstanding their original inclusion on Schedule "E" to this Order as Permitted Encumbrances.
6. Without limiting paragraph 4, upon delivery of the Monitor's Certificate, all right, title and interest in and to any assets held by any Applicant that are used or useful in connection with the Business (other than the Excluded Assets) or that would otherwise constitute Acquired Assets if held by any Seller, shall vest absolutely in the name of each applicable Purchaser, free and clear of all Encumbrances other than Permitted Encumbrances, and for greater certainty, all such assets shall constitute Acquired Assets and each Applicant shall constitute a Seller hereunder with respect to any such Acquired Assets.
7. Upon delivery of the Monitor's Certificate, and upon filing of a certified copy of this Order, together with any applicable registration fees, all governmental authorities and any other applicable registrar or government ministries or authorities exercising jurisdiction with respect to the Acquired Assets including, without limitation, those referred to at paragraph 8 of this Order (collectively, "**Governmental Authorities**") are hereby authorized, requested and directed to (i) accept delivery of such Monitor's Certificate and certified copy of this Order as though they were originals and to register such transfers, interest authorizations, discharges and discharge statements of conveyance as may be required to convey to the Purchasers clear title to the Acquired Assets subject only to Permitted Encumbrances, and (ii) take such steps as are necessary to give effect to the terms of this Order and the Purchase Agreement. Presentment of this Order and the Monitor's Certificate shall be the sole and sufficient authority for the Governmental Authorities to make and register transfers of title or interest free and clear of any Encumbrances other than Permitted Encumbrances.

8. Without limiting the generality of foregoing paragraph 7:
  - (a) each applicable Registrar under the Government of the Northwest Territories - Department of Industry, Tourism and Investment, including the Mining Recorder's Office of the Northwest Territories and all other government ministries and authorities in the Northwest Territories exercising jurisdiction with respect to the Acquired Assets, and each applicable Registrar under the Crown-Indigenous Relations and Northern Affairs Canada (Nunavut), including the Mining Recorder's Office of Nunavut shall and is hereby authorized, requested and directed to transfer in the name of one or more of the Purchasers, the mining leases, mineral claims and surface leases listed in **Schedule "C"** hereto free and clear of all Encumbrances, including without limitation, the Encumbrances listed in **Schedule "D"** hereto, other than the Permitted Encumbrances; and
  - (b) the applicable Registrar of the Canadian Intellectual Property Office shall be and is hereby authorized and directed to (i) cancel and discharge those Encumbrances, if any, other than the Permitted Encumbrances, registered against the estate or interest of the Sellers in and to the Acquired Assets, and (ii) transfer all of the right, title and interest of the Sellers in and to the Acquired Assets free and clear of and from any and all Encumbrances, if any, other than the Permitted Encumbrances.
9. No further authorization, approval or other action by and no notice to or filing with any governmental authority or regulatory body exercising jurisdiction over the Acquired Assets shall be required for the Closing and post-Closing implementation of the Transaction contemplated in the Purchase Agreement.
10. Upon delivery of the Monitor's Certificate together with a certified copy of this Order, this Order shall be immediately registered by the NWT Land Registrar in accordance with section 175 of the *Land Titles Act* (NWT), and notwithstanding that the appeal period in respect of this Order has not elapsed.
11. Upon completion of the Transaction, the Sellers and all Persons who claim by, through or under the Sellers in respect of the Acquired Assets, and all persons or entities having any Claims of any kind whatsoever in respect of the Acquired Assets, save and except

for the Persons entitled to the benefit of the Permitted Encumbrances (but solely with respect to and to the extent of such Permitted Encumbrances), shall stand absolutely and forever barred, estopped, and foreclosed from and permanently enjoined from pursuing, asserting, or claiming any and all right, title, estate, interest, royalty, rental, equity of redemption, or other Claim or Encumbrance whatsoever in respect of or to the Acquired Assets, and to the extent that any such Persons remain in the possession or control of any of the Acquired Assets, or any artifacts, certificates, instruments or other indicia of title representing or evidencing any right, title, estate or interest in and to the Acquired Assets, they shall forthwith deliver possession thereof to the applicable Purchaser.

12. Following completion of the Transaction, the Sellers are hereby permitted to complete, execute and file any necessary application, articles of amendment, certificate of amendment or such other documents or instruments as may be required to change their respective legal names, to the extent required pursuant to any of the Transaction Documents, and such articles, documents or other instruments shall be deemed to be duly authorized, valid and effective and shall be accepted by the applicable governmental authority without the requirement (if any) of obtaining director or shareholder approval pursuant to any applicable federal, provincial or state legislation.
13. The Purchasers shall be entitled to enter into and upon, hold and enjoy the Acquired Assets for their own use and benefit without any interference of or by any Person claiming by, through or against the Sellers.
14. Immediately upon Closing of the Transaction, the holders of the Permitted Encumbrances, other than [DDMI](#), the First Lien Lenders and their agents, shall have no claim whatsoever against the Monitor or the Sellers.
15. The Monitor is directed to file with the Court a copy of the Monitor's Certificate forthwith after delivery thereof to the Purchasers.
16. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), the Monitor and the Sellers are authorized and permitted to disclose and transfer to the Purchasers all human resources and payroll information in the Sellers' records pertaining to the Sellers' past and current employees. The

Purchasers shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in accordance with applicable law.

17. The Sureties Support Confirmations shall inure to the benefit of the Applicants and their respective agents, successors, and assigns, all of whom are hereby deemed to be beneficiaries of such Sureties Support Confirmations.

#### **BREAK-UP FEE AND CHARGE**

18. The Sellers' obligation to pay the Break-Up Fee pursuant to and in accordance with the Purchase Agreement is hereby approved.
19. The Bidders shall be entitled to the benefit of and are hereby granted a charge (the "**Break-Up Fee Charge**") on the Property as security for the payment of the Break-Up Fee by the Sellers pursuant to and in accordance with the Purchase Agreement.
20. The Break-Up Fee Charge shall rank in priority subsequent to the security securing both the (i) Charges; ~~and (ii) indebtedness under the Diavik Joint Venture Agreement; and~~ (iii) indebtedness under the Pre-filing Credit Agreement.

#### **MISCELLANEOUS MATTERS**

21. Notwithstanding:
  - (a) the pendency of these proceedings CCAA proceedings;
  - (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**") in respect of the Sellers and any bankruptcy order issued pursuant to any such applications;
  - (c) any application for a receivership order; or
  - (d) the provisions of any federal or provincial statute,

the vesting of the Acquired Assets in the Purchasers pursuant to this Order shall be binding on any trustee in bankruptcy or receiver that may be appointed in respect of the Sellers and shall not be void or voidable by creditors of the Sellers, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference,



assignment, fraudulent conveyance, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

22. The Monitor, the Sellers, the Purchasers and any other interested party shall be at liberty to apply for further advice, assistance and direction as may be necessary in order to give full force and effect to the terms of this Order and to assist and aid the parties in closing the Transaction.
23. This Honourable Court shall retain exclusive jurisdiction to, among other things, interpret, implement, and enforce the terms and provisions of this Order, the Purchase Agreement, all amendments thereto, in connection with any disputes involving the Applicants, and to adjudicate, if necessary, any and all disputes concerning the Applicants and related in any way to the Transaction; *provided, however*, that in the event that this Honourable Court abstains from exercising or declines to exercise jurisdiction or is without jurisdiction, such abstention, refusal or lack of jurisdiction shall have no effect upon and shall not control, prohibit or limit the exercise of jurisdiction of any other court having competent jurisdiction with respect to any such matter. This Honourable Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories, in the United States or in any of its states, including Delaware, or in any foreign jurisdiction, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Monitor in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such order and to provide such assistance to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

24. Nothing in the Purchase Agreement, any Ancillary Document or this Order shall:

(a) transfer, convey or assign the Sellers' interest in the Diavik Diamond Mine, the Diavik Joint Venture, the Diavik Joint Venture Interest or the Diavik Leases to any Person;

- (b) prejudice, extinguish or otherwise affect the rights and remedies of DDML under the Diavik Joint Venture Agreement (including, without limitation, the rights and remedies provided for in Article 9.4 of the Diavik Joint Venture Agreement);
- (c) relieve any of the Sellers of any indebtedness, liability or obligation under the Diavik Joint Venture Agreement;
- (d) affect the rights, remedies or priorities to any of the Diavik Realization Assets as established by the Subordination Agreement / Acknowledgement of Lien dated November 1, 2017 between, *inter alia*, DDML and Credit Suisse AG, Cayman Islands Branch;
- (e) affect the rights, remedies or priorities to any of the Diavik Realization Assets as established by the Subordination Agreement / Acknowledgement of Lien dated November 1, 2017 between, *inter alia*, DDML and Wilmington Trust, National Association;

and, in the case of a conflict between the provisions of the Purchase Agreement or any Ancillary Document and the provisions of this Order, the provisions this Order shall govern.

25. ~~24.~~ Service of this Order shall be deemed good and sufficient by serving the same in accordance with the procedures in the CaseLines Service Order granted May 29, 2020 in these proceedings.

Justice of the Court of Queen's Bench of Alberta

Document comparison by Workshare Compare on Thursday, December 10, 2020 9:26:31 PM

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Total changes	25

**TAB 1**

## **JVA PROVISIONS (AS AMENDED)**

...

- 1.5 "Assets" means the Properties, Products and all other personal property (which for greater certainty shall include all goods, intangibles, securities, money, documents of title, instruments and chattel paper together with all proceeds of and accessions to the foregoing) now or hereafter held by the Manager for the benefit of the Participants including without limitation all monies advanced from time to time by the Participants to the Manager pursuant to section 9.2 hereof.

...

- 1.23 "Participating Interest" means an undivided beneficial interest in the Assets, and all rights and obligations arising under this Agreement, as such interest may from time to time be adjusted hereunder, expressed as a percentage. Participating Interests shall be calculated to three decimal places and rounded to two (e.g., 1.519% rounded to 1.52%). Decimals of .005 or more shall be rounded up to .01, decimals of less than .005 shall be rounded down: The initial Participating Interests of the Participants are set forth in Section 5.3.

...

- 1.26 "Products" means all ores, minerals and mineral resources produced from the Properties under this Agreement including, without limitation, diamonds.

...

- 1.29 "Transfer" means sell, grant, assign, encumber, pledge or otherwise commit or dispose of.

...

### **9.4 Default in Making Contributions**

- (a) If a Participant elects to contribute to an approved Program and Budget and then defaults in its obligation to pay a contribution or cash call hereunder, the [non-defaulting Participant], by notice to the defaulting Participant, may at any time, but shall not be obligated to, elect to make such contribution or meet such cash call on behalf of the defaulting Participant (a "Cover Payment").
- (b) Each Cover Payment shall constitute indebtedness due from the defaulting Participant to the [non-defaulting Participant], which indebtedness shall be payable upon demand and shall bear interest from the date incurred to the date of payment at the rate specified in Section 9.3.
- (c) Each Participant hereby grants to the other, as security for repayment of the indebtedness referred to in Section 9.4 (b) above together with interest thereon, reasonable legal fees and all other reasonable costs and expenses incurred in collecting payment of such indebtedness and enforcing such security interest, a mortgage of and security interest in such Participant's right, title and interest in, to and under, whenever acquired or arising,

its Participating Interest and the Assets. Each Participant hereby represents and warrants to the other that such mortgage and security interest ranks and will rank at all times prior to any and all other mortgages and security interests granted by or charging the property of such Participant. Each Participant hereby agrees to take all action necessary to perfect such mortgage and security interest and irrevocably appoints the other Participant as its attorney-in-fact to execute, file and record all financing statements and any other documents necessary to perfect or maintain such mortgage and security interest or otherwise give effect to the provisions hereof. Upon default being made in the payment of the indebtedness referred to in Section 9.4 (b) when due the non-defaulting Participant may on 30 days' notice to the defaulting Participant exercise any or all of the rights and remedies available to it as a secured party at common law, by statute or hereunder including the right to sell the property subject to a mortgage and charge hereunder. The non-defaulting Participant shall remain liable for any deficiency after any sale by the defaulting Participant of the property subject to the mortgage and charge. In the event the non-defaulting Participant enforces the mortgage or security interest pursuant to the terms of this section, the defaulting Participant waives any available right of redemption from and after the date of judgment, any required valuation or appraisal of the mortgaged or secured property prior to sale, any available right to stay execution or to require a marshalling of assets and any required bond in the event a receiver is appointed. Nothing in this Section 9.4(c) shall constitute a waiver or abridgement of any right of a lender to whom a Participant has granted security, provided, however, that nothing in this sentence shall limit the effectiveness of that waiver as against the Participant, or as against such a secured lender to the Participant or any other person to the extent the secured lender or other person is asserting a right of the Participant which the Participant has waived.

...

#### 15.1 General

Each Participant shall have the right to Transfer to any third party all or any part of its Participating Interest solely as provided in this Article 15.

#### 15.2 Limitations on Free Transferability

The Transfer right of a Participant in Section 15.1 shall be subject to the following terms and conditions:

- (a) no transferee of all or any part of the Participating Interest of a Participant, a Control Interest in a Participant or an Affiliate or the Net Profits Royalty shall have any rights hereunder unless and until the transferring Participant has provided to the other Participants notice of the Transfer, and except as provided in Sections 15.2(d) and 15.2(e), the transferee, as of the effective date of the Transfer, has committed in writing to be bound by this Agreement to the same extent as the transferring Participant;
- (b) no transfer permitted by this Article 15 shall relieve the transferring Participant of any liability, whether accruing before or after such Transfer, which arises out of Operations conducted prior to such Transfer;
- (c) in the event of a Transfer of less than all of a Participating Interest, the transferring Participant and its transferee shall act and be treated as one Participant;

- (d) if the Transfer is the grant of a security interest by mortgage, deed of trust, pledge, lien or other encumbrance of the Participating Interest or Net Profits Royalty of a Participant to secure a loan or other indebtedness, such security interest shall be subordinate to the terms of this Agreement and the rights and interests of the other Participants hereunder. Upon any foreclosure or other enforcement of rights in the security interest the acquiring third party shall be deemed to have assumed the position of the encumbering Participant with respect to this Agreement and the other Participants, and it shall comply with and be bound by the terms and conditions of this Agreement; and
- (e) if a sale or other commitment or disposition of Products or proceeds from the sale of Products by a Participant upon distribution to it pursuant to Article 11 creates in a third party a security interest in Products or proceeds therefrom prior to such distribution, such sales, commitment or disposition shall be subject to the terms and conditions of this Agreement.

# TAB 2



# COURT OF APPEAL FOR ONTARIO

CITATION: U.S. Steel Canada Inc. (Re), 2016 ONCA 662

DATE: 20160909

DOCKET: C61331

Strathy C.J.O., Lauwers and Benotto JJA.

In the Matter of the *Companies' Creditors  
Arrangement Act*, R.S.C. 1985, c. C-36, As Amended

And in the Matter of a Proposed Plan of Compromise or  
Arrangement with Respect to U.S. Steel Canada Inc.

Gordon Capern, Kristian Borg-Olivier and Denise Cooney, for the appellant United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "Union"), Appellant

Andrew Hatnay and Barbara Walancik, for SSPO and non-union retirees and active employees of U.S. Steel Canada Inc.

Tamryn Jacobson, for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario)

Michael E. Barrack, Jeff Galway and John Mather, for United States Steel Corporation, Respondent

Sharon Kour, for U.S. Steel Canada Inc.

Heard: March 17, 2016

On appeal from the order of Justice H. Wilton-Siegel of the Superior Court of Justice, dated August 13, 2015.

**Strathy C.J.O.:**

[1] U.S. Steel Canada Inc. (“USSC”) is in CCAA<sup>1</sup> protection. Its former employees claim that its American parent, United States Steel Corporation (“USS”), ran the company into insolvency to further its own interests. An issue arose in the court below as to whether the CCAA judge could apply an American legal doctrine called “equitable subordination” to subordinate USS’s claims to the appellant’s claims.

[2] The CCAA judge held he had no jurisdiction to do so. For reasons different than the ones he gave, I agree, and would dismiss the appeal.

**FACTUAL BACKGROUND**

[3] USS is one of the largest steel producers in North America. In 2007, it acquired Stelco, which was in CCAA protection at the time, and changed its name to USSC.

[4] Seven years later, on September 16, 2014, USSC was again granted CCAA protection by order of the Superior Court of Justice (Commercial List).

[5] The CCAA judge made a Claims Process Order on November 13, 2014, establishing a procedure for filing, reviewing and resolving creditors’ claims against USSC.

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<sup>1</sup> *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

[80] What is apparent from the many creative orders that have been made, before and since the 2009 amendments, is that such orders are made squarely in furtherance of the legislature's objectives. In *Century Services*, at para. 59, the Supreme Court observed that "[j]udicial discretion must of course be exercised in furtherance of the CCAA's purposes", to avoid the devastating social and economic effects of bankruptcy while an attempt is made to organize the affairs of the debtor under court supervision.

[81] The words "may ... make any order it considers appropriate in the circumstances" in s. 11 must, in my view, be read as "may ... in furtherance of the purposes of this act, make any order it considers appropriate in the circumstances."

[82] There is no support for the concept that the phrase "any order" in s. 11 provides an at-large equitable jurisdiction to reorder priorities or to grant remedies as between creditors. The orders reflected in the case law have addressed the business at hand: the compromise or arrangement.

[83] I turn to the second limit on the court's jurisdiction under s. 11, the "restrictions set out in this Act". The first question is whether such restrictions must be express or can be implied.

[84] It bears noting that there are numerous express restrictions on the court's jurisdiction contained within the CCAA itself. Some are contained in Part II (Jurisdiction of Courts) and some are actually preceded by the heading "Restriction". In *North American Tungsten Corp. v. Global Tungsten and Powders*

of the Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa, November 2003), at p. 158-59.

(c) Section 36.1: Preferences and Assignments

[97] Section 36.1, which was part of the 2009 amendments, incorporates by reference provisions of the *BIA* permitting the court to invalidate prior fraudulent preferences or fraudulent assignments.

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

[98] The respondent argues that the inclusion of these express provisions implies that no other form of equitable remedy was contemplated. Its argument is that, had Parliament wished to invalidate or subordinate claims of creditors who had engaged in inequitable conduct in relation to other creditors, it could have expressly included that remedy.

[99] I would not read anything into s. 36.1, one way or the other. Nor would I regard it as a “restriction” set out in the Act within the meaning of s. 11.

**(6) Summary**

[100] The appellant requested “a declaration that the CCAA contains no restrictions within the meaning of s. 11 on the court’s ability to apply the doctrine of equitable

subordination.” In my view, this is the wrong inquiry and this is why I reach the same result as the CCAA judge, but for different reasons.

[101] I would not grant the relief sought because, applying the principles of statutory interpretation, nowhere in the words of the CCAA is there authority, express or implied, to apply the doctrine of equitable subordination. Nor does it fall within the scheme of the statute, which focuses on the implementation of a plan of arrangement or compromise. The CCAA does not legislate a scheme of priorities or distribution, because these are to be worked out in each plan of compromise or arrangement. The subordination of “equity claims” is directed towards a specific group, shareholders, or those with similar claims. It also has a specific function, consistent with the purpose of the CCAA: to facilitate the arrangement or compromise without shareholders’ involvement.

[102] The success of the CCAA in fulfilling its statutory purpose has been in large measure due to the ability of judges to fashion creative solutions, for which there is no express authority, through the exercise of their jurisdiction under s. 11. As Blair J.A. noted in *Metcalf and Mansfield*, however, the court’s powers are not limitless. They are shaped by the purpose and scheme of the CCAA. The appellant has not identified how equitable subordination would further the remedial purpose of the CCAA.

[103] At this stage of the analysis, I am mindful of the Supreme Court’s observation in *Century Services* that in most cases the court’s jurisdiction in CCAA matters will

be found through statutory interpretation. I am also mindful of its observation in *Indalex*, at para. 82, that courts should not use an equitable remedy to do what they wish Parliament had done through legislation. In my view, there is no “gap” in the legislative scheme to be filled by equitable subordination through the exercise of discretion, the common law, the court’s inherent jurisdiction or by equitable principles.

[104] There is no provision in the CCAA equivalent to s. 183 of the *BIA* or §105(a) of the U.S. *Bankruptcy Code*. Section 183 invests the bankruptcy court with “such jurisdiction at law and in equity” as will enable it to exercise its bankruptcy jurisdiction. This is significant, because if equitable subordination is to become a part of Canadian law, it would appear that the *BIA* gives the bankruptcy court explicit jurisdiction as a court of equity to ground such a remedy and a legislative purpose that is more relevant to the potential reordering of priorities.

## **CONCLUSION**

[105] For these reasons, I would dismiss the appeal. I would order that counsel may make written submissions as to costs, not to exceed five pages in length, excluding costs outlines. I would assume counsel can agree on a timetable for delivery of all costs submissions within 30 days of the release of these reasons.

“George R. Strathy C.J.O.”  
“I agree P. Lauwers J.A.”  
“I agree M.L. Benotto J.A.”

Released: “GRS” September 09, 2016

**TAB 3**

**Century Services Inc. Appellant**

v.

**Attorney General of Canada on behalf  
of Her Majesty The Queen in Right of  
Canada Respondent**

**INDEXED AS: CENTURY SERVICES INC. v. CANADA  
(ATTORNEY GENERAL)**

**2010 SCC 60**

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps,  
Fish, Abella, Charron, Rothstein and Cromwell JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR  
BRITISH COLUMBIA**

*Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).*

*Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.*

*Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.*

**Century Services Inc. Appelante**

c.

**Procureur général du Canada au  
nom de Sa Majesté la Reine du chef du  
Canada Intimé**

**RÉPERTORIÉ : CENTURY SERVICES INC. c. CANADA  
(PROCUREUR GÉNÉRAL)**

**2010 CSC 60**

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie,  
LeBel, Deschamps, Fish, Abella, Charron, Rothstein et  
Cromwell.

**EN APPEL DE LA COUR D'APPEL DE LA  
COLOMBIE-BRITANNIQUE**

*Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).*

*Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.*

*Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?*



The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("ETA") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("BIA"). However, s. 18.3(1) of the CCAA provided that any statutory deemed trusts in favour of the Crown did not operate under the CCAA, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the CCAA chambers judge, a payment not exceeding \$5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the BIA. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the ETA to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the CCAA to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

*Held* (Abella J. dissenting): The appeal should be allowed.

*Per* McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the ETA and s. 18.3(1) of the CCAA can be resolved through an interpretation that properly recognizes the history of the CCAA, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« LTA ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« LFI »). Toutefois, le par. 18.3(1) de la LACC prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la LACC a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la LFI. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la LTA, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la LACC ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

*Arrêt* (la juge Abella est dissidente) : Le pourvoi est accueilli.

*La juge en chef* McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la LTA et le par. 18.3(1) de la LACC en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la LACC, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the CCAA established above, because the Crown's deemed trust priority over GST claims would be lost under the CCAA and the Crown would rank as an unsecured creditor for this amount.

*Per Fish J.:* The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a CCAA or BIA provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the CCAA and in s. 67(3) of the BIA in clear and unmistakable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the BIA or the CCAA, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la LACC dégagee précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la LACC et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

*Le juge Fish :* Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la LTA, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la LACC ou de la LFI confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la LTA, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la LACC et au par. 67(3) de la LFI en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la LTA. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la LFI ou la LACC, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

*Per* Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

*La juge* Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44f) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith J.J.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

*Mary I. A. Buttery, Owen J. James and Matthew J. G. Curtis, for the appellant.*

*Gordon Bourgard, David Jacyk and Michael J. Lema, for the respondent.*

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell J.J. was delivered by

[1] DESCHAMPS J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). In that respect, two questions are raised. The first requires reconciliation of provisions of the CCAA and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("ETA"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the CCAA and not the ETA that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency*

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

*Mary I. A. Buttery, Owen J. James et Matthew J. G. Curtis, pour l'appelante.*

*Gordon Bourgard, David Jacyk et Michael J. Lema, pour l'intimé.*

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« LACC »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la LACC et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« LTA »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la LACC, et non la LTA, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la LACC et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

### 3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor “[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)” (s. 222(3)), while the *CCAA* stated at the relevant time that “notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded” (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.’s conclusion that an express trust in favour of the Crown was created by the court’s order of April 29, 2008.

#### 3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). **Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors’ enforcement actions and attempt to obtain**

### 3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l’insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l’égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l’insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l’époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d’imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c’est souvent le cas, le conflit apparent peut être résolu au moyen des principes d’interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l’historique de la *LACC*, la fonction de cette loi parmi l’ensemble des textes adoptés par le législateur fédéral en matière d’insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d’insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l’objectif de cette loi et l’interprétation qu’en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l’espèce, j’aborderai la conclusion du juge Tysoe selon laquelle l’ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

#### 3.1 *Objectif et portée du droit relatif à l’insolvabilité*

[12] L’insolvabilité est la situation de fait qui se présente quand un débiteur n’est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d’insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing \$1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of \$5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvable — personnes physiques ou personnes morales — qui doivent 1 000 \$ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

**TAB 4**

**IN THE MATTER OF the Bankruptcy of  
Carol Anne Giffen**

**R. West & Associates Inc. and the Attorney  
General of British Columbia** *Appellants*

v.

**Telecom Leasing Canada (TLC)  
Limited** *Respondent*

and

**The Attorney General of Canada, the  
Attorney General for Ontario and the  
Attorney General for Alberta** *Interveners*

**INDEXED AS: GIFFEN (RE)**

File No.: 25193.

1997: October 8; 1998: February 12.

Present: L'Heureux-Dubé, Sopinka,\* Gonthier, Cory,  
McLachlin, Iacobucci and Major JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR  
BRITISH COLUMBIA**

*Bankruptcy and insolvency — Personal property security — Company employee leasing vehicle — Lessor failing to register financing statements under B.C. Personal Property Security Act and thus perfect its security interest — Employee making assignment in bankruptcy — Property of bankrupt vesting in trustee under Bankruptcy and Insolvency Act — Unperfected security interest in collateral not effective against trustee under Personal Property Security Act — Whether trustee entitled to proceeds of sale of vehicle — Personal Property Security Act, S.B.C. 1989, c. 36, s. 20(b)(i) — Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, ss. 67(1), 71(2).*

The respondent lessor leased a car to a company which in turn leased it to G, one of its employees. The lease between G and her employer was for more than one year and gave G the option of purchasing the vehicle from the lessor. Although the lessor was not a party

\* Sopinka J. took no part in the judgment.

**DANS L'AFFAIRE DE la faillite de Carol  
Anne Giffen**

**R. West & Associates Inc. et le procureur  
général de la Colombie-  
Britannique** *Appellants*

c.

**Telecom Leasing Canada (TLC)  
Limited** *Intimée*

et

**Le procureur général du Canada, le  
procureur général de l'Ontario et le  
procureur général de l'Alberta** *Intervenants*

**RÉPERTORIÉ: GIFFEN (RE)**

N° du greffe: 25193.

1997: 8 octobre; 1998: 12 février.

Présents: Les juges L'Heureux-Dubé, Sopinka\*,  
Gonthier, Cory, McLachlin, Iacobucci et Major.

**EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-  
BRITANNIQUE**

*Faillite et insolvabilité — Sûreté mobilière — L'employée d'une société loue un véhicule — La bailleuse omet d'enregistrer une déclaration de financement en application de la Personal Property Security Act de la Colombie-Britannique et donc, de parfaire sa sûreté — L'employée produit une cession de faillite — Les biens de la faillite sont dévolus au syndic en vertu de la Loi sur la faillite et l'insolvabilité — La sûreté non parfaite grevant un bien est inopposable au syndic de faillite en vertu de la Personal Property Security Act — Le syndic a-t-il droit au produit de la vente? — Personal Property Security Act, S.B.C. 1989, ch. 36, art. 20(b)(i) — Loi sur la faillite et l'insolvabilité, L.R.C. (1985), ch. B-3, art. 67(1), 71(2).*

La bailleuse intimée a loué une voiture à une société qui, à son tour, l'a louée à G, l'une de ses employés. Le bail intervenu entre G et son employeur était d'une durée supérieure à une année et il stipulait, au profit de G, une option d'achat du véhicule. Bien qu'elle n'ait pas

\* Le juge Sopinka n'a pas pris part au jugement.

to the lease agreement, it played an important role in the arrangement. The lessor received a deposit from G, it fixed the lease rates, and it was entitled to receive payments directly from G if her employer stopped paying her. The lessor and G were also named as the owners of the vehicle in the registration and insurance documents; the lessor was described as the “lessor” and G was described as the “lessee”. G made an assignment in bankruptcy. Neither the lessor nor the employer had registered financing statements under the British Columbia *Personal Property Security Act* (“PPSA”) in respect of their leases, with the result that the lessor’s security interest in the car was not perfected. The lessor seized the vehicle and sold it with the appellant trustee’s consent. The trustee subsequently brought a motion for an order that it was entitled to the proceeds of sale, relying on s. 20(b)(i) of the PPSA, which provides that a security interest in collateral is not effective against a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy. The lessor opposed the claim on the grounds that the bankrupt never owned the car and that the trustee could not have a better claim to the car than the bankrupt had. The trial judge held that the lessor’s unperfected security interest was of no effect as against the trustee. The Court of Appeal reversed the decision and held that the proceeds properly belonged to the lessor.

*Held:* The appeal should be allowed.

The definition of “security interest” in the PPSA explicitly includes leases for a term of more than one year. The lessor’s interest in the car is the reservation of title in the car; this interest, created by the lease agreement, falls within the ambit of the PPSA. Since the lessor did not have possession of the car and did not register its security interest, it held an unperfected security interest in the car prior to the bankruptcy. The bankrupt’s right to use and possession of the car constitutes “property” for the purposes of the *Bankruptcy and Insolvency Act* (“BIA”), which passed to the trustee by virtue of s. 71(2). Section 12(2) of the PPSA also recognizes that a lessee obtains a proprietary interest in leased goods. Here, the trustee’s possessory interest in the car comes into competition with the unperfected security interest of the lessor. On a plain reading of s. 20(b)(i) of the PPSA, the lessor’s interest in the car is ineffective

été partie au contrat de location, la bailleresse jouait un rôle important dans le régime qui y était prévu. La bailleresse a reçu un dépôt de G, elle a fixé le taux de location et elle avait le droit de recevoir les paiements directement de G dans l’éventualité où l’employeur de cette dernière cessait de la payer. En outre, la bailleresse et G étaient désignées comme propriétaires du véhicule dans les documents d’immatriculation et d’assurance concernant la voiture; la bailleresse y était mentionnée en tant que «bailleresse» et G, en tant que «preneuse à bail». G a produit une cession de faillite. Ni la bailleresse ni l’employeur n’avaient enregistré une déclaration de financement relativement à leur bail en application de la *Personal Property Security Act* («PPSA») de la Colombie-Britannique. En raison de cette omission, la sûreté grevant la voiture au profit de la bailleresse n’était pas parfaite. La bailleresse a saisi le véhicule et l’a vendu avec le consentement du syndic appelant. Par la suite, le syndic a présenté une requête en vue d’obtenir une ordonnance portant qu’il avait droit au produit de la vente, en se fondant sur le sous-al. 20b)(i) de la PPSA, lequel prévoit que la sûreté grevant un bien est inopposable au syndic de faillite si, à la date de la faillite, elle est non parfaite. La bailleresse s’est opposée en faisant valoir que la voiture n’avait jamais appartenu à la faillie et que la réclamation du syndic ne pouvait être mieux fondée que celle qu’aurait exercée la faillie elle-même. Le juge de première instance a conclu que la sûreté non parfaite de la bailleresse était inopposable au syndic. La Cour d’appel a annulé la décision et conclu que le produit de la vente appartenait légitimement à la bailleresse.

*Arrêt:* Le pourvoi est accueilli.

La définition du mot «sûreté» qui figure dans la PPSA vise expressément les baux d’une durée de plus d’une année. L’intérêt de la bailleresse à l’égard de la voiture est constitué par la réserve du titre de propriété du véhicule; cet intérêt, issu du contrat de location, est visé par la PPSA. Vu que la bailleresse n’avait pas la possession de la voiture et qu’elle n’a pas enregistré sa sûreté, elle était titulaire, avant la faillite, d’une sûreté non parfaite grevant la voiture. Le droit de la faillie d’utiliser la voiture et d’en avoir la possession constitue un «bien» pour l’application de la *Loi sur la faillite et l’insolvabilité* («LFI») qui a été dévolu au syndic en vertu du par. 71(2). Le paragraphe 12(2) de la PPSA reconnaît également que le preneur à bail obtient un intérêt propriétaire à l’égard des biens pris à bail. En l’espèce, l’intérêt fondé sur la possession dont est titulaire le syndic à l’égard de la voiture entre en concurrence avec la sûreté

against the trustee. While the effect of s. 20(b)(i), on the present facts, is that the trustee ends up with full rights to the car when the bankrupt had only a right of use and possession, s. 20(b)(i) modifies the principle that a trustee is limited to the rights in the property enjoyed by the bankrupt. The issue is not ownership of the vehicle, but rather priority to it. Although federal bankruptcy legislation provides that a trustee shall step into the shoes of the bankrupt and as a general rule acquires no higher right in the property of the bankrupt than that which the bankrupt enjoyed, it is a policy choice of the legislature that an unsecured creditor's position, as represented by the trustee, is more meritorious than the unperfected security interest of a secured creditor.

The trustee can sell the car and confer good title. The lessor could have made a claim against the car under s. 81 of the *BIA*. This claim would have been defeated by the trustee in reliance on s. 20(b)(i) of the *PPSA*. Both the defeat of a claim and the failure to make a claim under s. 81 result in the effective abandonment or relinquishment of any claim to the car.

Section 20(b)(i) of the *PPSA* does not offend the priorities set out in the *BIA*, but rather is only one element of the provincial legislation which serves to define the rights of the parties involved in a bankruptcy. More particularly, s. 20(b)(i) serves, on the present facts, to define the rights of the lessor and indicates that for the purpose of the bankruptcy, the lessor does not have the status of a secured creditor. Even though bankruptcy is clearly a federal matter, and even though it has been established that the federal Parliament alone can determine distribution priorities, the *BIA* is dependent on provincial property and civil rights legislation in order to inform the terms of the *BIA* and the rights of the parties involved in the bankruptcy.

Since s. 20(b)(i) of the *PPSA* provides that the lessor's unperfected security interest is ineffective against the interest acquired by the trustee, the trustee need not make an election under s. 30(1)(k) of the *BIA* in order to realize its interest in the car.

non parfaite de la bailleresse. Il ressort d'une lecture ordinaire du sous-al. 20b)(i) de la *PPSA* que l'intérêt de la bailleresse à l'égard de la voiture n'est pas opposable au syndic. Certes, dans les circonstances du présent pourvoi, cette disposition a pour effet d'accorder au syndic la plénitude des droits à l'égard de la voiture, alors que la faillie n'avait que le droit d'usage et de possession, mais le sous-al. 20b)(i) modifie le principe selon lequel ne sont dévolus au syndic que les droits dont le failli était titulaire sur les biens visés. La question en litige n'est pas de savoir à qui appartient le véhicule, mais plutôt à qui doit être accordée la priorité à l'égard de celui-ci. Bien que la législation fédérale en matière de faillite prévoie qu'un syndic doit prendre la place du failli et que, règle générale, il n'obtient pas plus de droits sur les biens du failli que n'en avait ce dernier, le législateur a décidé — et il s'agit là d'un choix de politique générale — que la position du créancier non garanti représenté par le syndic est plus méritoire que celle du créancier garanti titulaire d'une sûreté non parfaite.

Le syndic peut vendre la voiture et conférer un titre libre. La bailleresse aurait pu présenter une réclamation à l'égard de la voiture en vertu de l'art. 81 de la *LFI*. La réclamation se serait heurtée au syndic sur le fondement du sous-al. 20b)(i) de la *PPSA*. Le rejet de la réclamation tout comme la non-présentation de la réclamation visée à l'art. 81 entraînent, en fait, le délaissement ou l'abandon de toute réclamation à l'égard de la voiture.

Le sous-alinéa 20b)(i) de la *PPSA* ne porte pas atteinte aux priorités établies dans la *LFI*; il n'est que l'un des éléments de la législation provinciale qui sert à définir les droits des parties impliquées dans une faillite. Plus particulièrement, le sous-al. 20b)(i) définit, en l'espèce, les droits de la bailleresse et énonce qu'aux fins de la faillite, la bailleresse n'a pas la qualité de créancière garantie. Bien que la faillite soit clairement une matière fédérale et bien qu'il ait été établi que seul le législateur fédéral pouvait arrêter l'ordre de priorité en matière de distribution, il faut nécessairement se référer aux lois provinciales en matière de propriété et de droits civils pour définir les termes utilisés dans la *LFI* et les droits des parties impliquées dans la faillite.

Vu que le sous-al. 20b)(i) de la *PPSA* prévoit que la sûreté non parfaite du bailleur est inopposable à l'intérêt acquis par le syndic, celui-ci n'a pas à faire de choix en vertu de l'al. 30(1)(k) de la *LFI* pour réaliser son intérêt à l'égard de la voiture.

G did not hold the car on resulting trust for the lessor, since the contract of lease does not contemplate the creation of a trust.

G ne détenait pas la voiture pour la bailleuse en vertu d'une fiducie par déduction, étant donné que le contrat de location ne prévoit pas la création d'une fiducie.

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**Distinguished:** *Fleeming v. Howden* (1868), L.R. 1 Sc. & Div. 372; *Flintoft v. Royal Bank of Canada*, [1964] S.C.R. 631; **approved:** *International Harvester Credit Corp. of Canada Ltd. v. Bell's Dairy Ltd. (Trustee of)* (1986), 61 C.B.R. (N.S.) 193; *Donaghy v. CNS Vehicle Leasing*, [1992] 6 W.W.R. 70; *David Morris Fine Cars Ltd. v. North Sky Trading Inc. (Trustee of)*, [1996] 7 W.W.R. 332; **referred to:** *Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of)*, [1989] 3 W.W.R. 481; *Re Perepeluk*; *Canadian Imperial Bank of Commerce v. Touche Ross Ltd.*, [1986] 2 W.W.R. 631; *Robinson v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Re Nishi Industries*, [1978] 6 W.W.R. 736; *Re Cadieux and Jas. A. Ogilvy's Ltd.* (1952), 33 C.B.R. 15; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24.

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*Personal Property Security Act*, S.B.C. 1989, c. 36, ss. 1 "security interest", 2(1), 3 [rep. & sub. 1993, c. 28, s. 16], 12(1)(b), (2), 20(b)(i), 21 [rep. & sub. 1990, c. 11, s. 5], 24, 25.

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**Distinction faite d'avec les arrêts:** *Fleeming c. Howden* (1868), L.R. 1 Sc. & Div. 372; *Flintoft c. Royal Bank of Canada*, [1964] R.C.S. 631; **arrêts approuvés:** *International Harvester Credit Corp. of Canada Ltd. c. Bell's Dairy Ltd. (Trustee of)* (1986), 61 C.B.R. (N.S.) 193; *Donaghy c. CNS Vehicle Leasing*, [1992] 6 W.W.R. 70; *David Morris Fine Cars Ltd. c. North Sky Trading Inc. (Trustee of)*, [1996] 7 W.W.R. 332; **arrêts mentionnés:** *Paccar Financial Services Ltd. c. Sinco Trucking Ltd. (Trustee of)*, [1989] 3 W.W.R. 481; *Re Perepeluk*; *Canadian Imperial Bank of Commerce c. Touche Ross Ltd.*, [1986] 2 W.W.R. 631; *Robinson c. Countrywide Factors Ltd.*, [1978] 1 R.C.S. 753; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Re Nishi Industries*, [1978] 6 W.W.R. 736; *Re Cadieux and Jas. A. Ogilvy's Ltd.* (1952), 33 C.B.R. 15; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Deloitte Haskins and Sells Ltd. c. Workers' Compensation Board*, [1985] 1 R.C.S. 785; *Banque fédérale de développement c. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 R.C.S. 1061; *Colombie-Britannique c. Henfrey Samson Belair Ltd.*, [1989] 2 R.C.S. 24.

## Lois et règlements cités

*Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3 [mod. 1992, ch. 27, art. 2], art. 2 «biens», 30(1)(k), 67(1) [*idem*, art. 33], 71, 72, 81, 136(1).  
*Personal Property Security Act*, S.B.C. 1989, ch. 36, art. 1 «security interest» («sûreté»), 2(1), 3 [abr. & rempl. 1993, ch. 28, art. 16], 12(1)(b), (2), 20(b)(i), 21 [abr. & rempl. 1990, ch. 11, art. 5], 24, 25.

## Doctrine

Buckwold, Tamara M., and Ronald C. C. Cuming. «The Personal Property Security Act and the Bankruptcy and Insolvency Act: Two Solitudes or Complementary Systems?» (1997), 12 *Banking & Finance L. Rev.* 467.  
 Cuming, Ronald C. C. «Canadian Bankruptcy Law: A Secured Creditor's Heaven» (1994), 24 *Can. Bus. L.J.* 17.  
 Waters, D. W. M. *Law of Trusts in Canada*, 2nd ed. Toronto: Carswell, 1984.



Ziegel, Jacob S. "Personal Property Security and Bankruptcy: There Is No War! — A Reply to Roman and Sweatman" (1993), 72 *Can. Bar Rev.* 44.

APPEAL from a judgment of the British Columbia Court of Appeal (1996), 16 B.C.L.R. (3d) 29, 131 D.L.R. (4th) 453, [1996] 5 W.W.R. 111, 69 B.C.A.C. 161, 113 W.A.C. 161, 37 C.B.R. (3d) 297, [1996] B.C.J. No. 37 (QL), reversing a decision of the British Columbia Supreme Court (1994), 90 B.C.L.R. (2d) 326, [1994] 6 W.W.R. 439, 29 C.B.R. (3d) 309, [1994] B.C.J. No. 857 (QL), allowing the appellant trustee's action. Appeal allowed.

*Geoffrey H. Dabbs*, for the appellant R. West & Associates Inc.

*R. Richard M. Butler*, for the appellant the Attorney General of British Columbia.

*John Douglas Shields* and *Alastair Wade*, for the respondent.

*Edward R. Sojonky, Q.C.*, and *Jan Brongers*, for the intervener the Attorney General of Canada.

*Richard J. K. Stewart*, for the intervener the Attorney General for Ontario.

Written submissions only by *James A. Baird*, for the intervener the Attorney General for Alberta.

The judgment of the Court was delivered by

IACOBUCCI J. — The principal question raised by this appeal is whether s. 20(b)(i) of the *Personal Property Security Act*, S.B.C. 1989, c. 36 ("PPSA"), can render a lessor's unperfected security interest in personal property ineffective against the rights acquired in the property by the trustee in bankruptcy, which finds its authority under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA"). I conclude that s. 20(b)(i) operates, on the present facts, to defeat the unperfected security interest of the respondent Telecom Leasing Canada (TLC) Limited (the "lessor"), in favour

Ziegel, Jacob S. «Personal Property Security and Bankruptcy: There Is No War! — A Reply to Roman and Sweatman» (1993), 72 *R. du B. can.* 44.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1996), 16 B.C.L.R. (3d) 29, 131 D.L.R. (4th) 453, [1996] 5 W.W.R. 111, 69 B.C.A.C. 161, 113 W.A.C. 161, 37 C.B.R. (3d) 297, [1996] B.C.J. No. 37 (QL), qui a annulé une décision de la Cour suprême de la Colombie-Britannique (1994), 90 B.C.L.R. (2d) 326, [1994] 6 W.W.R. 439, 29 C.B.R. (3d) 309, [1994] B.C.J. No. 857 (QL), qui avait accueilli l'action du syndic appellant. Pourvoi accueilli.

*Geoffrey H. Dabbs*, pour l'appelante R. West & Associates Inc.

*R. Richard M. Butler*, pour l'appelant le procureur général de la Colombie-Britannique.

*John Douglas Shields* et *Alastair Wade*, pour l'intimée.

*Edward R. Sojonky, c.r.*, et *Jan Brongers*, pour l'intervenant le procureur général du Canada.

*Richard J. K. Stewart*, pour l'intervenant le procureur général de l'Ontario.

Argumentation écrite seulement par *James A. Baird*, pour l'intervenant le procureur général de l'Alberta.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — La principale question soulevée dans le présent pourvoi est de savoir si le sous-al. 20b(i) de la *Personal Property Security Act*, S.B.C. 1989, ch. 36 («PPSA»), peut rendre la sûreté non parfaite, constituée sur un bien personnel au profit d'une bailleresse, inopposable aux droits acquis par le syndic de faillite sur le bien grevé en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3 («LFI»). Je conclus que le sous-al. 20b(i) a pour effet, dans les circonstances de l'espèce, d'écarter la sûreté non parfaite de l'intimée Telecom Leasing Canada (TLC)

where the bankrupt has leased the property of another.

Finding it unnecessary to address the other issues raised by the lessor or to deal with the constitutional questions raised by the Attorney General, Finch J.A. allowed the appeal and directed that the proceeds be paid to the lessor.

#### 4. Issues

There is one principal issue in the present appeal: can s. 20(b)(i) of the *PPSA* extinguish the lessor's right to the car in favour of the trustee's interest, or is the operation of s. 20(b)(i) limited by certain provisions of the *BIA*?

In my view, this issue can be resolved through a normal reading of the relevant provisions of both the *PPSA* and the *BIA*, buttressed by the policy considerations supporting these provisions.

#### 5. Analysis

##### A. *The Locus of Title Is Not Determinative*

At the outset, it is important to note that the Court of Appeal's holding in the present appeal rests on the principle that the "property of the bankrupt" shall vest in the trustee (s. 71(2) *BIA*) and that only the property of the bankrupt shall be distributed among the bankrupt's creditors (s. 67(1) *BIA*). In the opinion of the Court of Appeal, the bankrupt, as lessee, did not have a proprietary interest in the car, and since the trustee obtains its entitlements to the contents of the bankrupt's estate through the bankrupt, the trustee cannot assert a proprietary interest in the car. In my view, the Court of Appeal, with respect, erred fundamentally in focussing on the locus of title and in holding that the lessor's common law ownership interest prevailed despite the clear meaning of s. 20(b)(i).

The Court of Appeal did not recognize that the provincial legislature, in enacting the *PPSA*, has

appartenant au failli et qu'il ne s'appliquait pas dans les cas où le failli avait pris à bail un bien appartenant à un tiers.

Estimant qu'il était inutile d'examiner les autres questions soulevées par la bailleuse ainsi que les questions constitutionnelles soulevées par le procureur général, le juge Finch a accueilli l'appel et ordonné que le produit de la vente soit versé à la bailleuse.

#### 4. Les questions en litige

Voici la question principale soulevée dans le présent pourvoi: le sous-al. 20b)(i) de la *PPSA* peut-il éteindre le droit dont est investie la bailleuse sur la voiture au profit de l'intérêt du syndic, ou l'application du sous-al. 20b)(i) est-elle limitée par certaines dispositions de la *LFI*?

À mon avis, cette question peut être tranchée par une lecture ordinaire des dispositions pertinentes de la *PPSA* et de la *LFI*, étayée par les considérations de principe qui sous-tendent ces dispositions.

#### 5. Analyse

##### A. *La détention du titre de propriété n'est pas déterminante*

D'emblée, il importe de souligner que la décision de la Cour d'appel en l'espèce repose sur le principe que «les biens du failli» doivent être dévolus au syndic (par. 71(2) de la *LFI*) et que seuls les biens du failli doivent être partagés parmi les créanciers de celui-ci (par. 67(1) de la *LFI*). Selon la Cour d'appel, comme la faillie, en tant que preneuse à bail, n'avait pas d'intérêt propriétaire à l'égard de la voiture, et que le syndic tient du failli les droits qu'il exerce sur le contenu de l'actif, le syndic ne pouvait faire valoir d'intérêt propriétaire à l'égard de la voiture. J'estime, en toute déférence, que la Cour d'appel a commis une erreur fondamentale en se concentrant sur la détention du titre de propriété et en concluant que le droit de propriété reconnu en common law à la bailleuse prévalait, malgré le sens clair du sous-al. 20b)(i).

La Cour d'appel n'a pas reconnu que le législateur provincial, en adoptant la *PPSA*, a, dans une

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set aside the traditional concepts of title and ownership to a certain extent. T. M. Buckwold and R. C. C. Cuming, in their article “The *Personal Property Security Act* and the *Bankruptcy and Insolvency Act*: Two Solitudes or Complementary Systems?” (1997), 12 *Banking & Finance L. Rev.* 467, at pp. 469-70, underline the fact that provincial legislatures, in enacting personal property security regimes, have redefined traditional concepts of rights in property:

Simply put, the property rights of persons subject to provincial legislation are what the legislature determines them to be. While a statutory definition of rights may incorporate common law concepts in whole or in part, it is open to the legislature to redefine or revise those concepts as may be required to meet the objectives of its legislation. This was done in the provincial PPSAs, which implement a new conceptual approach to the definition and assertion of rights in and to personal property falling within their scope. The priority and realization provisions of the Acts revolve around the central statutory concept of “security interest”. The rights of parties to a transaction that creates a security interest are explicitly not dependent upon either the form of the transaction or upon traditional questions of title. Rather, they are defined by the Act itself. [Emphasis added.]

certain mesure, écarté les concepts traditionnels du titre de propriété et de la propriété. Les auteurs T. M. Buckwold et R. C. C. Cuming, dans leur article intitulé «The *Personal Property Security Act* and the *Bankruptcy and Insolvency Act*: Two Solitudes or Complementary Systems?» (1997), 12 *Banking & Finance L. Rev.* 467, aux pp. 469 et 470, soulignent le fait qu’en adoptant des régimes de sûretés mobilières, les législateurs provinciaux ont redéfini les concepts traditionnels des droits réels:

[TRADUCTION] En termes simples, les droits réels exercés par les personnes assujetties à la législation d’une province sont définis par le législateur provincial. Bien que la loi qui définit des droits puisse incorporer, en tout ou en partie, des concepts de common law, il est loisible au législateur de redéfinir ou réviser ces concepts en vue d’atteindre les objectifs de la législation. C’est le cas des PPSA provinciales, lesquelles appliquent une nouvelle approche conceptuelle à l’égard de la définition et de la revendication des droits relatifs aux biens personnels qu’elles visent. Les dispositions de ces lois en matière de priorité et de réalisation sont axées sur un concept central, d’origine législative, celui de la «sûreté». Les droits des parties à une opération qui crée une sûreté sont expressément indépendants de la forme de l’opération et des questions traditionnelles concernant le titre de propriété. Ils sont plutôt définis par la loi elle-même. [Je souligne.]

<sup>27</sup> In *International Harvester, supra*, the Saskatchewan Court of Appeal recognized that the regime put in place to regulate competing interests in personal property does not turn on title to the collateral (at p. 204):

There is nothing in the language of the section [s. 20 of the Saskatchewan PPSA which is the equivalent of s. 20 of the British Columbia PPSA], or its relationship with other sections, or indeed in the overall scheme of the Act to suggest, for example, that an unperfected security interest, because it is rooted in and attached to the title of particular goods in the possession of a debtor, should be treated as superior to the more generally derived and broadly attached interest which an execution creditor comes to have in a debtor’s goods. Indeed, the very opposite is suggested not only by the language of the section, but by the overall thrust of the Act.

Dans l’arrêt *International Harvester*, précité, la Cour d’appel de la Saskatchewan a reconnu que le régime instauré pour régler les intérêts concurrents à l’égard de biens personnels n’est pas fonction du titre de propriété du bien grevé (à la p. 204):

[TRADUCTION] Il ne ressort nullement du libellé de la disposition [l’art. 20 de la PPSA de la Saskatchewan, soit le pendant de l’art. 20 de la PPSA de la Colombie-Britannique], de ses interrelations avec les autres dispositions, ni, en fait, du sens général de la Loi, que, par exemple, la sûreté non parfaite, du fait qu’elle se fonde sur le titre de propriété de biens particuliers en la possession du débiteur, doive être considérée comme supérieure à l’intérêt en général plus dérivé et plus large quant à l’assiette que viendra à exercer le créancier saisissant à l’égard des biens. En fait, c’est tout le contraire que laisse entendre non seulement le texte de la disposition, mais également l’esprit général de la Loi.

# TAB 5

## **PERSONAL PROPERTY SECURITY ACT**

S.N.W.T. 1994,c.8  
In force May 7, 2001;  
Except s.1(1), 42, 43(1.1), 71 which came  
into force April 27, 2001;  
SI-004-2001

## **AMENDED BY**

S.N.W.T. 1997,c.15  
In force April 1, 1998;  
SI-006-98  
S.N.W.T. 1998,c.5  
S.N.W.T. 1999,c.5  
S.N.W.T. 2003,c.5  
S.N.W.T. 2006,c.23  
S.N.W.T. 2007,c.21  
In force April 1, 2008;  
SI-006-2007  
S.N.W.T. 2009,c.12  
S.N.W.T. 2009,c.14  
In force August 1, 2009;  
SI-005-2009  
S.N.W.T. 2010,c.16  
S.N.W.T. 2011,c.23  
In force April 1, 2012  
S.N.W.T. 2012,c.18  
S.N.W.T. 2018,c.18  
S.N.W.T. 2018,c.15  
In force February 15, 2019  
Except sections 1-2, 4-6, 8-11, 13-15 and 18-29  
SI-001-2019

## **LOI SUR LES SÛRETÉS MOBILIÈRES**

L.T.N.-O. 1994, ch. 8  
En vigueur le 7 mai 2001, à  
l'exception de ses articles 42 et 71  
et de ses paragraphes 1(1) et 43(1.1)  
qui sont entrés en vigueur le 27 avril 2001;  
TR-004-2001

## **MODIFIÉE PAR**

L.T.N.-O. 1997, ch. 15  
En vigueur le 1<sup>er</sup> avril 1998;  
TR-006-98  
L.T.N.-O. 1998, ch. 5  
L.T.N.-O. 1999, ch. 5  
L.T.N.-O. 2003, ch. 5  
L.T.N.-O. 2006, ch. 23  
L.T.N.-O. 2007, ch. 21  
En vigueur le 1<sup>er</sup> avril 2008;  
TR-006-2007  
L.T.N.-O. 2009, ch. 12  
L.T.N.-O. 2009, ch. 14  
En vigueur le 1<sup>er</sup> août 2009;  
TR-005-2009  
L.T.N.-O. 2010, ch. 16  
L.T.N.-O. 2011, ch. 23  
En vigueur le 1<sup>er</sup> avril 2012  
L.T.N.-O. 2012, ch. 18  
L.T.N.-O. 2018, ch. 18  
L.T.N.-O. 2018, ch. 15  
En vigueur le 15 février 2019  
sauf les articles 1-2, 4-6, 8-11, 13-15 et  
18-29, TR-001-2019

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Applicable law respecting substance and procedure	<p><b>8. (1)</b> Notwithstanding sections 5, 6, 7 and 7.1,</p> <p>(a) procedural issues involved in the enforcement of the rights of a secured party against collateral are governed by the law of the jurisdiction in which the enforcement rights are exercised; and</p> <p>(b) substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.</p>	<p><b>8. (1)</b> Malgré les articles 5, 6, 7 et 7.1 :</p> <p>a) les questions de procédure liées à l'exercice des droits d'un créancier garanti sur des biens grevés sont régies par la loi du ressort où s'exercent ces droits;</p> <p>b) les questions de fond liées à l'exercice des droits d'un créancier garanti sur des biens grevés sont régies par la loi applicable au contrat qu'il a passé avec le débiteur.</p>	Questions de procédure et questions de fond
Applicable law respecting perfection	<p>(2) For the purposes of sections 5, 6, 7 and 7.1, a security interest is perfected under the law of a jurisdiction if the secured party has complied with the law of the jurisdiction with respect to the creation and continuance of a security interest with the result that the security interest has a status in relation to any other secured party, buyer and judgment creditor and a trustee in bankruptcy of the debtor similar to that of an equivalent security interest created and perfected under this Act. S.N.W.T. 2009,c.14,s.107(8).</p>	<p>(2) Pour l'application des articles 5, 6, 7 et 7.1, une sûreté est rendue opposable en vertu de la loi d'un ressort si le créancier garanti s'est conformé à la loi de ce ressort en ce qui a trait à la constitution et au maintien des sûretés de manière que la sûreté a, à l'égard des autres créanciers garantis, acheteurs et créanciers judiciaires ainsi qu'à l'égard d'un syndic de faillite, un effet similaire à celui d'une sûreté équivalente constituée et rendue opposable en vertu de la présente loi. L.T.N.-O. 2009, ch. 14, art. 107(8).</p>	Loi applicable en ce qui concerne l'opposabilité
Law of jurisdiction	<p><b>8.1.</b> For the purposes of sections 5 to 8, a reference to the law of a jurisdiction means the internal law of that jurisdiction excluding its conflict of law rules. S.N.W.T. 2009,c.14,s.107(9).</p>	<p><b>8.1.</b> Pour l'application des articles 5 à 8, la mention de la loi d'un ressort désigne la loi interne de ce ressort, à l'exception de ses règles de conflits de lois. L.T.N.-O. 2009, ch. 14, art. 107(9).</p>	Interprétation — loi du ressort
<div> <div> <b>PART II</b>  <b>VALIDITY OF SECURITY AGREEMENTS AND RIGHTS OF PARTIES</b> </div> <div> <b>PARTIE II</b>  <b>VALIDITÉ DES CONTRATS DE SÛRETÉ ET DROITS DES PARTIES</b> </div> </div>			
Effectiveness of security agreement	<p><b>9.</b> Subject to this or any other Act, a security agreement is effective according to its terms.</p>	<p><b>9.</b> Sous réserve des autres dispositions de la présente loi et de toute autre loi, le contrat de sûreté est exécutoire selon la convention des parties.</p>	Validité du contrat de sûreté
Security interest in account or chattel paper	<p><b>9.1.</b> An account debtor as defined in subsection 41(1) may take a security interest in the account or chattel paper under which the account debtor is obligated.</p>	<p><b>9.1.</b> Le débiteur d'un compte au sens du paragraphe 41(1) peut prendre une sûreté sur le compte ou l'acte mobilier pour lequel il est obligé.</p>	Sûreté sur un compte ou un acte mobilier
Enforceability of security interest	<p><b>10. (1)</b> Subject to subsection (2) and section 12.1, a security interest is only enforceable against a third party if</p> <p>(a) the collateral is not a certificated security and is in the possession of the secured party;</p> <p>(b) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 68 of the <i>Securities Transfer Act</i> pursuant to the debtor's security agreement;</p> <p>(c) the collateral is investment property and the secured party has control under</p>	<p><b>10. (1)</b> Sous réserve du paragraphe (2) et de l'article 12.1, la sûreté n'est opposable aux tiers que dans l'un ou l'autre des cas suivants :</p> <p>a) le bien grevé n'est pas une valeur mobilière avec certificat et est en la possession du créancier garanti;</p> <p>b) le bien grevé est une valeur mobilière avec certificat nominative et le certificat a été livré au créancier garanti selon l'article 68 de la <i>Loi sur le transfert des valeurs mobilières</i>, conformément au contrat de sûreté du débiteur;</p> <p>c) le bien grevé est un bien de placement dont le créancier garanti a la maîtrise</p>	Opposabilité de la sûreté aux tiers

subsection 1(1.1) pursuant to the debtor's security agreement; or

(d) the debtor has signed a security agreement that contains

(i) a description of the collateral by item or kind or by reference to one or more of the following:

- (A) crops,
- (B) goods,
- (C) chattel paper,
- (D) investment property,
- (E) documents of title,
- (F) instruments,
- (G) money,
- (H) intangibles,

(ii) a description of collateral that is a security entitlement, securities account or futures account, if it describes the collateral by those terms or as "investment property" or if it describes the underlying financial asset or futures contract,

(iii) a statement that a security interest is taken in all of the present and after-acquired personal property of the debtor, or

(iv) a statement that a security interest is taken in all of the present and after-acquired personal property of the debtor except specified items or kinds of personal property or except personal property described by reference to one or more of the following:

- (A) crops,
- (B) goods,
- (C) chattel paper,
- (D) investment property,
- (E) documents of title,
- (F) instruments,
- (G) money,
- (H) intangibles.

selon le paragraphe 1(1.1), conformément au contrat de sûreté du débiteur;

d) le débiteur a signé un contrat de sûreté qui contient, selon le cas :

(i) une description des biens grevés par article ou genre, ou par référence à au moins l'un des cas suivants :

- (A) les récoltes,
- (B) les objets,
- (C) les actes mobiliers,
- (D) les biens de placement,
- (E) les titres,
- (F) les effets,
- (G) l'argent,
- (H) les biens meubles incorporels,

(ii) une description du bien grevé qui est un droit intermédié, un compte de titres ou un compte de contrats à terme s'il décrit le bien par ces termes ou comme «bien de placement» ou qu'il décrit l'actif financier ou le contrat à terme sous-jacent,

(iii) une déclaration portant qu'une sûreté greève tous les biens personnels actuels du débiteur ainsi que tous les biens personnels qu'il acquerra après la conclusion du contrat,

(iv) une déclaration portant qu'une sûreté greève tous les biens personnels actuels du débiteur ainsi que tous les biens personnels qu'il acquerra après la conclusion du contrat, à l'exclusion des articles ou genres de biens personnels ou à l'exclusion des biens personnels précisés par référence à au moins l'un des cas suivants :

- (A) les récoltes,
- (B) les objets,
- (C) les actes mobiliers,
- (D) les biens de placement,
- (E) les titres,
- (F) les effets,
- (G) l'argent,
- (H) les biens meubles incorporels.

Secured party  
deemed not  
in possession

(2) For the purposes of paragraph (1)(a), a secured party is deemed not to be in possession of collateral that is in the apparent possession or control of the debtor or an agent of the debtor.

(2) Pour l'application de l'alinéa (1)a), le créancier garanti est réputé ne pas être en possession des biens grevés qui sont en la possession ou sous la maîtrise apparente du débiteur ou de son mandataire.

Créancier garanti  
réputé ne pas être en  
possession des  
biens grevés



Description of consumer goods	(3) A description is inadequate for the purposes of paragraph (1)(d) if it describes the collateral as consumer goods or equipment without further reference to the item or kind of collateral.	(3) Pour l'application de l'alinéa (1)d), est insuffisante la description qui indique uniquement que les biens grevés sont des biens de consommation ou du matériel.	Description des biens de consommation
Description of inventory	(4) A description of collateral as inventory is adequate for the purposes of paragraph (1)(d) only while it is held by the debtor as inventory.	(4) Pour l'application de l'alinéa (1)d), la description qui indique que les biens grevés sont un stock est suffisante uniquement pendant la période au cours de laquelle le débiteur les garde à ce titre.	Description du stock
Description of proceeds	(5) A security interest in proceeds is enforceable against a third party whether or not the security agreement contains a description of the proceeds. S.N.W.T. 2009,c.14,s.107(10).	(5) La sûreté qui vise un produit est opposable aux tiers même si le contrat de sûreté ne contient pas une description du produit. L.T.N.-O. 2009, ch. 14, art. 107(10).	Description du produit
Delivery of copy of security agreement to debtor	11. Where a security agreement is in writing, the secured party shall deliver a copy of the security agreement to the debtor not later than 10 days after the execution of the security agreement and, if the secured party fails to do so after a request by the debtor, the Supreme Court may, on application by the debtor, make an order for the delivery of a copy to the debtor.	11. Lorsque le contrat de sûreté est fait par écrit, le créancier garanti remet au débiteur une copie du contrat dans les dix jours suivant sa signature. S'il omet de le faire après que le débiteur lui en a fait la demande, la Cour suprême peut, sur requête du débiteur, lui ordonner de remettre une copie au débiteur.	Remise d'une copie du contrat au débiteur
Attachment of security interest	12. (1) A security interest, including a security interest in the nature of a floating charge, attaches when <ul style="list-style-type: none"> <li>(a) value is given,</li> <li>(b) the debtor has rights in the collateral or power to transfer rights in the collateral to a secured party, and</li> <li>(c) except for the purpose of enforcing rights as between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10,</li> </ul> unless the parties specifically agree in writing to postpone the time of attachment, in which case the security interest attaches at the time specified in the agreement.	12. (1) La sûreté, y compris toute sûreté de la nature d'une charge flottante, ne grève les biens que si les conditions suivantes sont remplies : <ul style="list-style-type: none"> <li>a) une prestation est fournie à son égard;</li> <li>b) le débiteur a des droits sur les biens grevés ou le pouvoir de transférer ces droits à un créancier garanti;</li> <li>c) sauf aux fins de l'exercice de droits entre les parties au contrat de sûreté, elle est opposable en conformité avec l'article 10,</li> </ul> à moins que les parties ne conviennent expressément par écrit de reporter la date à laquelle la sûreté prendra effet, auquel cas les biens ne deviennent grevés qu'à la date indiquée dans le contrat.	Moment où les biens deviennent grevés
Attachment under lease or commercial consignment	(2) For the purposes of paragraph (1)(b) and without limiting other rights, if any, that the debtor may have, a lessee under a lease for a term of more than one year or a consignee under a commercial consignment has rights in the goods when the lessee or consignee obtains possession of them pursuant to the lease or consignment.	(2) Pour l'application de l'alinéa (1)b) et sans qu'il soit porté atteinte aux autres droits que le débiteur peut avoir, le cas échéant, le locataire aux termes d'un bail d'une durée supérieure à un an ou le consignataire aux termes d'une consignation commerciale a des droits sur les objets au moment où il obtient possession de ceux-ci aux termes du bail ou de la consignation.	Bail ou consignation commerciale
When debtor's rights arise	(3) For the purposes of paragraph (1)(b), a debtor has no rights in <ul style="list-style-type: none"> <li>(a) crops until they become growing crops;</li> <li>(b) the young of animals until they are conceived;</li> <li>(c) petroleum, gas or minerals until they are extracted; or</li> </ul>	(3) Pour l'application de l'alinéa (1)b), le débiteur n'a aucun droit sur : <ul style="list-style-type: none"> <li>a) les récoltes, avant qu'elles ne soient sur pied;</li> <li>b) le croît des animaux, avant qu'ils ne soient conçus;</li> <li>c) le pétrole, le gaz ou les minéraux, avant</li> </ul>	Moment où le droit du débiteur prend naissance

not exceeding the amount prescribed for each demand, but the debtor is entitled to a reply without payment of a fee once every six months.

à l'avance d'un droit n'excédant pas le montant réglementaire pour chaque demande formelle; toutefois, le débiteur a droit à une réponse sans frais une fois tous les six mois.

Secured party may rely on statement in demand

(18) A secured party who receives a demand that purports to be made by a person entitled to make it under subsection (1) may act as if the person is, in fact, entitled to make the demand unless the secured party knows that the person is not entitled to make it.

(18) Le créancier garanti qui reçoit une demande formelle censée être faite par une personne visée au paragraphe (1) peut agir comme si la personne avait réellement le droit de faire la demande, à moins qu'il ne sache que cette personne n'a pas le droit de la faire.

Choix du créancier garanti

### PART III PERFECTION AND PRIORITIES

### PARTIE III OPPOSABILITÉ DE LA SÛRETÉ ET PRIORITÉS

Perfection of security interest

**19. A security interest is perfected when it has attached and every other step required for perfection under this Act is completed, regardless of the order of occurrence.**

**19. La sûreté est opposable aux tiers lorsqu'elle grève les biens et que toutes les autres exigences de la présente loi concernant l'opposabilité ont été remplies, sans égard à l'ordre chronologique.**

Opposabilité de la sûreté

Perfection of security interest in securities account

**19.1. (1) Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account.**

**19.1. (1) L'opposabilité d'une sûreté sur un compte de titres rend aussi opposable la sûreté sur les droits intermédiaires qui sont portés sur le compte.**

Opposabilité de la sûreté — compte de titres

Perfection of security interest in futures account

(2) Perfection of a security interest in a futures account also perfects a security interest in the futures contracts carried in the futures account. S.N.W.T. 2009,c.14,s.107(15).

(2) L'opposabilité d'une sûreté sur un compte de contrats à terme rend aussi opposable la sûreté sur les contrats à terme qui sont portés sur le compte. L.T.N.-O. 2009, ch. 14, art. 107(15).

Opposabilité de la sûreté — compte de contrats à terme

Perfection on attachment, delivery of financial asset

**19.2. (1) A security interest arising in the delivery of a financial asset under subsection 12.1(3) is perfected when it attaches.**

**19.2. (1) La sûreté créée en raison de la livraison d'un actif financier en application du paragraphe 12.1(3) est rendue opposable lorsqu'elle grève le bien.**

Opposabilité au moment où le bien est grevé — livraison d'un actif financier

Perfection on attachment, investment property

(2) A security interest in investment property created by a broker or securities intermediary is perfected when it attaches.

(2) La sûreté sur un bien de placement constituée par un courtier ou par un intermédiaire en valeurs mobilières est rendue opposable lorsqu'elle grève le bien.

Opposabilité au moment où le bien est grevé — bien de placement

Perfection on attachment, futures contract or account

(3) A security interest in a futures contract or a futures account created by a futures intermediary is perfected when it attaches. S.N.W.T. 2009,c.14, s.107(15).

(3) La sûreté sur un contrat à terme ou un compte de contrats à terme constituée par un intermédiaire en contrats à terme est rendue opposable lorsqu'elle grève le bien. L.T.N.-O. 2009, ch. 14, art. 107(15).

Opposabilité au moment où le bien est grevé — contrat à terme ou compte de contrats à terme

Priority of unperfected security interests

**20. (1) A security interest**  
(a) in collateral is subordinate to the interest of  
(i) a person who causes the collateral to be seized under legal process to enforce a judgment including

**20. (1) La sûreté :**  
a) dont des biens sont grevés est subordonnée à l'intérêt :  
(i) de celui qui fait saisir les biens grevés par voie judiciaire afin de faire appliquer un jugement,

Priorités des sûretés inopposables

Meaning of possession	(2) For the purposes of this section, where goods are shipped by common carrier to a debtor or to a third party designated by the debtor, the debtor does not obtain possession of the goods until either the debtor or the third party obtains actual possession of the goods or a document of title to the goods. S.N.W.T. 2009,c.12,s.15(7).	(2) Pour l'application du présent article, lorsque des objets lui sont expédiés par transporteur public ou sont expédiés à un tiers qu'il désigne, le débiteur ne prend possession des objets qu'au moment où soit lui-même, soit le tiers prend possession effective des objets ou d'un titre sur ceux-ci.	Sens de «possession»
Continuity of perfection	<b>23. (1) If a security interest is perfected under this Act and is again perfected in some other way under this Act without an intermediate period when it is unperfected, the security interest is continuously perfected for the purposes of this Act.</b>	<b>23. (1)</b> La sûreté devenue opposable en vertu de la présente loi et rendue de nouveau opposable selon une autre modalité prévue par la présente loi, sans qu'intervienne une période d'inopposabilité, est opposable sans interruption pour l'application de la présente loi.	Continuité de l'opposabilité
Priority when security interest transferred	(2) A transferee of a security interest has the same priority with respect to perfection of the security interest as the transferor had at the time of the transfer.	(2) Le bénéficiaire du transfert d'une sûreté, en ce qui concerne l'opposabilité de celle-ci, est subrogé à l'auteur du transfert au moment du transfert.	Priorité lorsque la sûreté est transférée
Perfection by possession	<b>24. (1)</b> Except where possession is a result of seizure or repossession and subject to section 19, possession of the collateral by the secured party, or on behalf of the secured party by another person, perfects a security interest in (a) chattel paper; (b) goods; (c) an instrument; (d) <b>Repealed, S.N.W.T. 2009,c.14, s.107(17);</b> (e) a negotiable document of title; and (f) money.	<b>24. (1)</b> Sous réserve de l'article 19, sauf si elle est le résultat d'une saisie ou d'une reprise de possession, et sous réserve de l'article 19, la possession des biens grevés par le créancier garanti ou pour son compte par une autre personne, rend opposable la sûreté sur : a) un acte mobilier; b) des objets; c) un effet; d) <b>Abrogé, L.T.N.-O. 2009, ch. 14, art. 107(17);</b> e) un titre négociable; f) de l'argent.	Opposabilité par possession
Meaning of possession	(2) For the purposes of subsection (1), a secured party does not have possession of collateral that is in the actual or apparent possession or control of the debtor or an agent of the debtor.	(2) Pour l'application du paragraphe (1), le créancier garanti n'a pas possession des biens grevés si ceux-ci sont en la possession ou sous la maîtrise réelle ou apparente du débiteur ou de son mandataire.	Sens de «possession»
Perfection of certificated security by delivery	(3) Subject to section 19, a secured party may perfect a security interest in a certificated security by taking delivery of the certificated security under section 68 of the <i>Securities Transfer Act</i> .	(3) Sous réserve de l'article 19, le créancier garanti peut rendre opposable une sûreté sur une valeur mobilière avec certificat en en prenant livraison en application de l'article 68 de la <i>Loi sur le transfert des valeurs mobilières</i> .	Opposabilité — valeur mobilière avec certificat
Perfection of certificated security in registered form	(4) Subject to section 19, a security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under section 68 of the <i>Securities Transfer Act</i> and remains perfected by delivery until the debtor obtains possession of the security certificate. S.N.W.T. 2009,c.14,s.107(17).	(4) Sous réserve de l'article 19, la sûreté sur une valeur mobilière avec certificat nominative est rendue opposable par livraison lorsque celle-ci a lieu selon l'article 68 de la <i>Loi sur le transfert des valeurs mobilières</i> et le demeure jusqu'à ce que le débiteur entre en possession du certificat. L.T.N.-O. 2009, ch. 14, art. 107(17).	Opposabilité — valeur mobilière avec certificat nominative

Perfection of security interest in investment property	<p><b>24.1.</b> (1) Subject to section 19, a security interest in investment property may be perfected by control of the collateral under subsection 1(1.1).</p>	<p><b>24.1.</b> (1) Sous réserve de l'article 19, la sûreté sur un bien de placement peut être rendue opposable par maîtrise du bien grevé selon le paragraphe 1(1.1).</p>	Opposabilité de la sûreté sur un bien de placement
Duration of perfection	<p>(2) Subject to section 19, a security interest in investment property is perfected by control under subsection 1(1.1) from the time the secured party obtains control and remains perfected by control until</p> <ul style="list-style-type: none"> <li>(a) the secured party does not have control; and</li> <li>(b) one of the following occurs: <ul style="list-style-type: none"> <li>(i) if the collateral is a certificated security, the debtor has or acquires possession of the security certificate,</li> <li>(ii) if the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner, or</li> <li>(iii) if the collateral is a security entitlement, the debtor is or becomes the entitlement holder.</li> </ul> </li> </ul> <p>S.N.W.T. 2009,c.14,s.107(18).</p>	<p>(2) Sous réserve de l'article 19, la sûreté sur un bien de placement est rendue opposable par maîtrise selon le paragraphe 1(1.1) dès que le créancier garanti obtient la maîtrise et elle le demeure jusqu'à ce que les conditions suivantes soient réunies :</p> <ul style="list-style-type: none"> <li>a) le créancier garanti n'a pas la maîtrise;</li> <li>b) l'une ou l'autre des éventualités suivantes se présente : <ul style="list-style-type: none"> <li>(i) si le bien grevé est une valeur mobilière avec certificat, le débiteur a ou prend possession du certificat,</li> <li>(ii) si le bien grevé est une valeur mobilière sans certificat, l'émetteur a inscrit ou inscrit le débiteur comme propriétaire inscrit,</li> <li>(iii) si le bien grevé est un droit intermédié, le débiteur en est le titulaire ou le devient.</li> </ul> </li> </ul> <p>L.T.N.-O. 2009, ch. 14, art. 107(18).</p>	Opposabilité par maîtrise
Perfection by registration	<p><b>25.</b> Subject to section 19, registration of a financing statement perfects a security interest in collateral.</p>	<p><b>25.</b> Sous réserve de l'article 19, l'enregistrement d'un état de financement rend opposable la sûreté sur tout bien grevé.</p>	Opposabilité par enregistrement
Temporary perfection	<p><b>26.</b> (1) Notwithstanding section 10, a security interest perfected as described in section 24 in</p> <ul style="list-style-type: none"> <li>(a) an instrument or a certificated security that a secured party delivers to the debtor for the purpose of <ul style="list-style-type: none"> <li>(i) sale or exchange,</li> <li>(ii) presentation, collection or renewal, or</li> <li>(iii) registration of a transfer, or</li> </ul> </li> <li>(b) a negotiable document of title or in goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for the purpose of <ul style="list-style-type: none"> <li>(i) sale or exchange,</li> <li>(ii) loading, unloading, storing, shipping or trans-shipping, or</li> <li>(iii) manufacturing, processing, packaging or otherwise dealing with goods in a manner preliminary to their sale or exchange,</li> </ul> </li> </ul> <p>remains perfected for the first 15 days after the collateral comes under the control of the debtor.</p>	<p><b>26.</b> (1) Malgré l'article 10, demeure opposable, pendant 15 jours après que les biens grevés ont été remis au débiteur, la sûreté rendue opposable en conformité avec l'article 24 et qui vise :</p> <ul style="list-style-type: none"> <li>a) un effet ou une valeur mobilière avec certificat que le créancier garanti remet au débiteur en vue, selon le cas : <ul style="list-style-type: none"> <li>(i) d'une vente ou d'un échange,</li> <li>(ii) de la présentation, du recouvrement ou du renouvellement,</li> <li>(iii) de l'enregistrement d'un transfert;</li> </ul> </li> <li>b) un titre négociable, ou des objets détenus par un dépositaire qui ne sont pas visés par un titre négociable, que le créancier garanti met à la disposition du débiteur en vue, selon le cas : <ul style="list-style-type: none"> <li>(i) d'une vente ou d'un échange,</li> <li>(ii) d'un chargement, d'un déchargement, d'un entreposage, d'une expédition ou d'un transbordement,</li> <li>(iii) de la fabrication, du traitement, de l'emballage ou d'une autre opération se rapportant à des objets destinés à la vente ou à l'échange.</li> </ul> </li> </ul>	Opposabilité temporaire